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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Vermont

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF VERMONT

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QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

- I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant?
- II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?
- III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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OPINIONS BELOW

The order and opinion of the Supreme Court of the State of Vermont is not yet reported. It is reprinted in the Appendix at A1-A16.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Appendix at B1-B3.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Petitioner seeks issuance of a writ of certiorari to review an order and opinion of the Supreme Court of the State of Vermont dated and entered April 15, 1983. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

U.S. Const. amend. XIV, § 1, cl. 2:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B")¹ petitioner herein, a publisher of financial reports.² The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of \$50,000.00 compensatory damages and \$300,000.00 punitive damages.

1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.³

¹ Dun & Bradstreet, Inc. is a wholly owned subsidiary of the Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of the Dun & Bradstreet Corporation are Donnelley & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Services Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

² D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

³ If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the Howard Bank, American Express Company, State Mutual Insur-

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president contacted D&B's regional office in Manchester, New Hampshire and advised D&B that the Special Notice was in error. On that same day, a retraction in the form of a "Correction Notice" was issued explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. This Correction Notice was sent to each of the five subscribers who had received the original Special Notice.

2. The Proceedings Below

At trial, Greenmoss claimed that it was libeled by the publication of the Special Notice. Greenmoss did not offer testimony from *any* of the five subscribers or any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages was the testimony of its own former president, who had a pecuniary interest in the outcome of the case. He speculated that although the company's profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of \$2,000 - \$5,000 to contact individuals to refute the erroneous information.

Greenmoss contended that the Special Notice had prompted one of the five subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that the bank's decision was not made on account of

the Special Notice but for other reasons by two bank officers who had no knowledge of it.

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous *per se*. This means that the *Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.* (emphasis added).

Later, the Court added:

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel *per se*, *damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel *per se*, for you

to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant. (emphasis added).

Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." It defined "malice" as follows:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously (emphasis added).

D&B timely objected to the portions of the court's instructions on libel *per se* and punitive damages.

Following the trial court's instructions on presumed and punitive damages, the jury returned a verdict for Greenmoss in the amount of \$350,000.00, consisting of \$50,000.00 compensatory damages and \$300,000.00 punitive damages. The \$50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only \$31,000 in lost profits (\$50,000 "projected" profits less \$19,000 profits actually earned), plus expenses not in excess of \$5,000.

Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

D&B filed a timely post-trial motion for a new trial. D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for

defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted. (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning the propriety of its order granting a new trial. The issue underlying the certified questions was the applicability of *Gertz* to non-media defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards enunciated in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

[W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

Reaffirming the propriety of an award of presumed damages, the Vermont Supreme Court also held:

[W]hen the defamation action is actionable per se the plaintiff can recover general damages with-

out proof of loss or injury, which is conclusively presumed to result from the defamation. . . .

REASONS FOR GRANTING THE WRIT

STATE AND FEDERAL COURT DECISIONS APPLYING *GERTZ V. ROBERT WELCH, INC.* IRRECONCILABLY CONFLICT AS TO BOTH RESULT AND RATIONALE.

A writ of certiorari should issue so that this Court can determine whether the constitutional protections against imposition of presumed and punitive damages in defamation cases established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to both "media" and "non-media" defendants.

This substantial First Amendment question is one which this Court has expressly reserved for decision.⁴ It is a recurring question in both state and federal courts which only this Court can resolve. It is a question with which the lower courts are struggling and upon which they are reaching inconsistent results on uncertain and hopelessly conflicting rationales because no clear guidance has yet been given to them. This case, involving a plaintiff who is not a public figure and an allegedly defamatory statement which was neither published in a newspaper nor broadcast over

⁴ See *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309 (1979) ("We have not adjudicated the role of the First Amendment in suits by private parties against non-media defendants. . . ."); *Hutchinson v. Proxmire*, 443 U.S. 111, 113 n.16 (1979) ("This Court has never decided the question . . . [of whether 'the New York Times standard can apply to an individual defendant rather than to a media defendant.']").

radio or television, puts the question in clear form and provides a perfect opportunity for deciding it.

1. Gertz v. Robert Welch, Inc. Recognized First Amendment Limitations On Defamation Damages.

State and lower court opinions on the role of the First Amendment in defamation cases, although reaching conflicting results based upon inconsistent and indefensible rationales, have one thing in common—they all purport to be interpreting and applying the constitutional standards recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* involved a libel action against the publisher of a monthly magazine espousing the views of the John Birch Society. The magazine had published an article describing plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Because plaintiff was a “private individual” and not a “public official” or “public figure,” this Court held that the trial court erred in requiring plaintiff to meet the *New York Times Co. v. Sullivan* “actual malice” standard for liability:

We hold that, *so long as they do not impose liability without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. (emphasis added).

Id. at 347. This Court made equally clear, however, that private individuals who recover under *liability* standards less severe than actual malice nevertheless remain subject to strict constitutional limitations with respect to *damages*:

[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

. . . .

. . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 349-50. Thus, *Gertz* holds that public plaintiffs must show "actual malice" to establish liability; and that *all* defamation plaintiffs must show "actual malice" to recover presumed or punitive damages.

2. Lower Courts Interpreting *Gertz* Have Reached Conflicting Results.

Since this Court's decision in *Gertz*, confusion and disagreement about its applicability have plagued decisions of the state and lower federal courts. This conflict is most clearly grasped through comparison of the result reached by the Vermont Supreme Court in this case with the opposite result reached in a similar case by the Arizona courts.

In *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (Ariz.App. 1978), a building contractor accused an architect of slandering his business reputation. The contractor sought lost profits as well as punitive damages. After being instructed that it could presume damages from words which were slanderous *per se*, the jury awarded both compensatory and punitive damages. The Court of Appeals of Arizona, however, applying

Gertz, set aside *both* damage awards—the compensatory award on the ground that it constituted presumed damages; and the punitive award on the grounds that the *Sullivan* “actual malice” standards had not been charged.

As in *Nelson*, this case involves a private plaintiff building contractor alleging defamation to business reputation against a defendant who is neither a broadcaster nor publisher of books, magazines or newspapers. As in *Nelson*, the plaintiff here sought lost profits and punitive damages. As in *Nelson*, the jury was charged on a defamation *per se* theory of presumed damages, and was not given a proper charge with respect to “actual malice.” Yet Arizona’s application of *Gertz* in *Nelson* resulted in an award of nominal damages of \$1.00, while Vermont’s refusal to apply *Gertz* herein resulted in a verdict of \$350,000.00, including punitive damages of \$300,000.00.

Aside from *Nelson*, the following cases extend *Gertz* to non-media defendants. *DeCarvalho v. da Silva*, __ R.I. __, 414 A.2d 806 (1980); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Avins v. White*, 627 F.2d 637 (3rd Cir.), *cert. denied*, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Hammerhead Enterprises, Inc. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D. N.Y. 1982); *Woy v. Turner*, 533 F. Supp. 102 (N.D. Ga. 1981); *Busie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980); *Beneficial Management Corp. v. Evans*, 421 So.2d 92 (Ala. 1982); *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E. 2d 246 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N.E. 2d 329 (1976); *Anderson v. Low Rent Housing Commission*, 304 N.W. 2d 239 (Iowa), *cert. denied*, 454 U.S. 1086 (1981); *Williams v. Pasma*, __

Mont. ___, 656 P.2d 212 (1982); *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *McQuoid v. Springfield Newspapers, Inc.*, 502 F.Supp. 1050 (W.D. Mo. 1980) (dictum).

Cases which reach the opposite result include the decision of the Vermont Supreme Court here and *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Schomer v. Smidt*, 113 Cal.App.3d 828, 170 Cal.Rptr. 662 (1980); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270 (Ky. 1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Harley-Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wisc. 2d 636, 318 N.W.2d 141, cert. denied, ___ U.S. ___, 103 S. Ct. 179 (1982); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W. 2d 737 (1975). See generally, *Recent Development, State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 Vand. L. Rev. 1431 (1976).

3. Decisions of Lower Courts Interpreting Gertz Are Based Upon Conflicting Rationales And Analytically Indefensible Distinctions.

Most of the courts that have faced the issue are in accord with *Nelson* and contradict the decision of the Vermont Supreme Court. In *DeCarvalho, supra*, the Rhode Island Supreme Court refused to distinguish between classes or types of defendants in the application of First Amendment principles in defamation cases:

Defining professional members of the media would be a difficult task indeed. This would re-

quire drawing distinctions between free-lance writers and the occasional author of a book, article, or pamphlet on the one hand and regularly employed agents of a great metropolitan daily newspaper or broadcasting syndicate on the other. As far as we are aware, the freedom of the press enshrined in the First Amendment was designed to apply to the lonely pamphleteer as well as to the (then unknown) syndicated columnist. In any event, the short answer to this contention is that the Supreme Court of the United States has clearly applied the *New York Times* standard to nonmedia defendants in *St. Amant v. Thompson*, *supra* (a candidate for public office) and in *Garrison v. Louisiana*, *supra* (a district attorney). Thus the trial justice was correct in drawing no distinction between defendant in this case and so-called "media defendants."

414 A.2d at 813.

Similarly, in *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), the Maryland Court of Appeals reasoned:

Although [*New York Times v. Sullivan*] . . . arose in a media context, the holding contained no caveat restricting its application to media publications; nor has the Supreme Court hesitated to apply it in non-media cases. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the defamatory comments were made during a press conference, and in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), they were made during a televised speech. In both instances, the media merely served as a vehicle for the defamatory

statements by the defendants and the Court focused on free speech and public debate rather than on the protection of the media. In *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965), the Court in a short per curiam opinion applied *New York Times* where an individual who had been arrested by a police chief charged in a letter to a deputy sheriff and in a statement read to several wire services that the arrest was a "diabolical plot." Similarly, in non-media cases arising from labor disputes the Court has found the constitutional privilege applicable. *Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). A number of lower courts have also applied the *New York Times* standard in non-media cases, and one court has applied *New York Times* in an action by an officer of a private club for defamations arising out of communications between club members concerning his activities. *Evans v. Lawson*, 351 F.Supp. 279 (W.D. Va. 1972).

Nor do we discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in *New York Times*, *Curtis* and *Gertz* is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case. See Restatement (Second) of Torts §580A, Comment h (Tent. Draft No. 21, 1975); but cf. *Nimmer, supra*. The proposition

that the press enjoys greater rights than members of the public generally was rejected by the Supreme Court in *Pell v. Procunier*, 417 U.S. 817, 834-35, 94 S.Ct. 2800, 41 L.Ed. 495 (1974), where a newspaper argued that it had a constitutional right to interview inmates of a state correctional system despite a regulation prohibiting such contacts.

. . . .

Any rule according less favorable treatment to certain types of non-media defendants might well present "difficult questions concerning the roles of the press and other speakers in our society." Anderson, *supra*, 53 Texas L. Rev. at 442-43 n. 95. Furthermore, most non-media private defamations arise in the context of one of the common law privileges; "[t]he completely gratuitous private defamation is rare." Thus, experience suggests that liability without fault is unusual in non-media private defamation cases. Frakt, *supra*, 6 Rutgers-Camden L.J. at 511.

Yet another reason for applying the *Gertz* holding to non-media defendants and to slander as well as libel is the compelling need for consistency and simplicity in the law of defamation. To limit the *Gertz* principles to media defendants and to cases of libel would mean one test, that of *New York Times*, for defamation of public officials and figures; another, which imposes a greater degree of proof than strict liability, and bans presumed and punitive damages, for cases brought by private plaintiffs against media defendants; and at least one more based on existing common law principles for all other defamation,

an area of tort law which, wholly apart from the advent of constitutional considerations, has traditionally been noted for its complexity. The rationale for applying the *Gertz* holding to non-media defendants and to slander as well as libel is aptly stated in the Restatement (Second) of Torts §580B, Comment e (Tent. Draft No. 21, 1975):

" . . . As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

. . . There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant."

350 A.2d at 694-96. *Accord*, *Avins v. White*, 627 F.2d 637, 649 (3rd Cir.) (" . . . [N]on-extension of the *New York Times* privilege to private individuals [as opposed to institutional press defendants] . . . creates a dangerous disequilibrium between the first amend-

ment's guarantees of freedom of speech and the press."), *cert. denied*, 449 U.S. 982 (1980); *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239, 247 (Iowa) (finding "no basis in the plain language of the first amendment that would justify according greater protection to the media than to private parties. . ."), *cert. denied*, 454 U.S. 1086 (1981).

In *Beneficial Management Corp. of America v. Evans*, 421 So.2d 92 (Ala. 1982), the court made clear that private plaintiffs are restricted to compensation for actual injury, even in suits involving non-media defendants:

This Court has decided that the *Gertz* rule shall apply to non-media defendants; therefore, since *Gertz* abolishes the notion of "presumed damages" and limits compensation in defamation cases which are actionable per se to recovery for actual injuries only, we hereby recognize this to be the law of Alabama.

Id. at 96. *Accord*, *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App.3d 735, 342 N.E.2d 329 (1976); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *see also*, *McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1054 (W.D. Mo. 1980) ("Gertz standards apply in all defamation actions regardless of the status of the defendant.") (dictum) (emphasis in original) (citing *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *rev'd on other grounds*, 656 F.2d 323 (8th Cir. 1981)).

Attempts by the Vermont Supreme Court and other minority jurisdictions to limit application of the rules

announced in *Gertz* lack sound analytical basis. In *Calero, supra*, for example, the Wisconsin Supreme Court refused to apply *Gertz*'s punitive damages rules by characterizing the content of the allegedly defamatory message:

Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

228 N.W.2d at 747. Yet this Court has flatly rejected attempts to analyze First Amendment protections in terms of the political utility or other supposedly beneficial content of the message. Indeed, dissatisfaction with "content" regulation was the very reason why this Court in *Gertz* discarded the "newsworthiness" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The *Gertz* Court wished to avoid

. . . forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not— . . . We doubt the wisdom of committing this task to the conscience of judges.

Gertz, supra, 418 U.S. at 346; *see also, Sullivan, supra*, 376 U.S. at 271 ("The constitutional protection does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered."); *Time, Inc., v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); Shiffrin, *Defamatory Non-media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 926 (1978) ("*Gertz* plainly states that communications which are deemed to have nothing to do with self-government

and which do not relate to public issues fall within the ambit of first amendment protection. . .").⁵

Content is not the only ground upon which lower courts have managed to avoid applying *Gertz*. In this case and in others, courts have sought to restrict the class of speakers (defendants) who may invoke its protections. Like the Vermont Supreme Court here, the court in *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) sought to limit *Gertz* to some undefined class of "media" defendants. And in *Columbia*

⁵Prior to *Gertz*, some courts had applied *Rosenbloom's* now-discarded "public interest test" to deny First Amendment protection to financial reports. See *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), cert. denied, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz's* rejection of *Rosenbloom*.

Moreover, to the extent content remains at all pertinent, this Court has since made clear that the type of financial information at issue herein is unquestionably worthy of First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court acknowledged society's "strong interest in the free flow of commercial information;" and pointed out that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763 and 764. See *Christie, supra*, 75 Mich. L. Rev. at 66 ("[T]he distinction between commercial and noncommercial speech is breaking down, as well it should. Freedom of speech is, after all, of concern in commercial as well as in other contexts."); see also, *Hammerhead, supra*, 551 F. Supp. at 1369 ("There is no requirement that a defendant seek broad public circulation of his views in order to be protected by *New York Times v. Sullivan*").

Sussex Corp. v. Hay, 627 S.W.2d 270, 277 (Ky. 1982), *Gertz* was held applicable only to a group designated as the "communication industry."

These speaker-based distinctions are ultimately indefensible. *First*, to the extent these distinctions are based upon the "worth" or "value" of messages likely to be disseminated by particular speakers, they are merely a disguised form of the type of "content" regulation previously rejected by this Court and inconsistent with First Amendment jurisprudence. See Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885-86 (1982). *Second*, the distinction produces arbitrary results—a newspaper or television broadcasting verbatim the statement of an individual can "create" a constitutional privilege otherwise inapplicable to the individual's statement. Or, as in this case, the same financial information published by D&B would have been adjudicated differently if published in a local newspaper. *Third*, the justification for imposing more lenient rules upon the institutional press—paid professionals whose widespread communications threaten the greatest damage—is doubtful. *Jacron, supra*, 350 A.2d at 695. *Fourth*, such distinction injects needless complexity into the law to the extent "media" and "non-media" defendants are to be differentiated and then subjected to differing standards, sometimes even in the context of the same case. See *The Public Figure Plaintiff, the Nonmedia Defendant and Defamation Law: Balancing the Respective Interests*, 68 Iowa L. Rev. 517, 524 n.56 (1983) ("[T]he definitions of public figure and media defendant are unclear.") *Finally*, a special and exalted status for the press in defamation cases is unsupportable as a matter of constitutional history. See

First National Bank of Boston v. Bellotti, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring); *Lange, The Speech and Press Clauses*, 23 UCLA L. Rev. 77 (1975).

This Court has never expressly limited its holdings in *Sullivan* or *Gertz* to "media" or any other class of defendants. *Sullivan* itself applied the same "actual malice" test to both *The New York Times* as well as the private individual defendants who had placed the allegedly defamatory advertisement. *Sullivan, supra*, 376 U.S. at 286. *Accord, St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual not a member of institutional press). Thus, apart from engendering confusion and unfairness, the decision of the Vermont Supreme Court and others like it depart from this Court's attempted development of a coherent body of constitutional law in defamation cases. D&B respectfully submits that the time has come for this Court to reach and decide the questions raised by this petition.

Commentators have bemoaned the chaotic state of defamation law and have urged that this Court re-examine it. *See Christie, Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43 (1976); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 935 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876 (1982) (advocating novel "context-based" transactional approach).

As Professor Christie has persuasively reasoned:

[T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.

. . . .

The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it. The underlying reason for these difficulties is likely traced to the fundamental assumption in *Sullivan* that it is possible to have different standards of liability depending on who is involved or, as the later cases have demonstrated, on what is involved.

. . . .

[One] . . . reason to believe that the . . . Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.

. . . .

The only way to accommodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.

Christie, *supra*, 75 Mich. L. Rev. at 58, 63, 64, 66 (emphasis added), *Accord*, 52 Wash. L. Rev. 975, 979 n.29 (1977); Shiffrin, *supra*, 25 UCLA L. Rev. 915, 935 (1978); see also, *Qualified Privilege to Defame Employees And Credit Applicants*, 12 Harv. C.R.-C.L.L. Rev. 143, 173 (1977) (Supreme Court extension of *Gertz* to all defendants deemed "likely").

CONCLUSION

Holding squarely that the First Amendment's limitations on damages for libel are inapplicable to non-media defendants, the Vermont Supreme Court approved the trial court's presumed and punitive damages instructions. D&B respectfully submits that a writ of certiorari should issue so that this Court can reverse the Vermont Supreme Court's holding that *Gertz* is inapplicable to non-media defendants.

The issue presented in this case transcends the interests of the individual litigants. Conflict and confusion as to the applicability of *Gertz* are rampant in both the state and federal courts. The recurring split in results reached by the courts, as well as the inconsistent and indefensible rationales offered even among courts reaching the same result, attest to the need for resolution of the questions posed by this petition. Issuance of the writ is vital to ensure effective and fair implementation of the fundamental dictates of the First Amendment.

Respectfully submitted,

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APPENDIX

A1

APPENDIX A

ENTRY ORDER

**SUPREME COURT DOCKET NO. 173-81
NOVEMBER TERM, 1982**

APPEALED FROM:
Greenmoss Builders, Inc. } Washington Superior Court
v. }
Dun & Bradstreet, Inc. } **DOCKET NO. S326-
77WnC**

In the above entitled cause the Clerk will enter:

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

Dissenting: /s/ **WILLIAM C. HILL,**
Associate Justice

Concurring:

_____ /s/ **ALBERT W. BARNEY,**
Chief Justice

_____ /s/ **FRANKLIN S. BILLINGS, JR.,**
Associate Justice

_____ /s/ **WYNN UNDERWOOD,**
Associate Justice

_____ /s/ **LOUIS P. PECK,**
Associate Justice

No. 173-81

Greenmoss Builders, Inc. Supreme Court

v. On Appeal from
Washington Superior
Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.

Villa & Heilmann, Burlington, for plaintiff-appellant
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood
and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for \$50,000 in compensatory or actual damages, and \$300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid \$200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No pre-publication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc.*, *supra*, the Supreme Court, in the last major pronouncement of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth." *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), cert. denied, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley, supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that *Gertz* does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

Id. at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz, supra*; *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz*, *supra*; *Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues" *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan*, *supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see Prosser, *Law of Torts*, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

Id. at 32. Although we have never expressly denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable" *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel*, *supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard*, *supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

Corporation, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,'" *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki*, *supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 157, 130 A. at 789.

IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.¹ There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

¹ In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

Associate Justice

B1

APPENDIX B

STATE OF VERMONT
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS

v

DUN & BRADSTREET

SUPERIOR COURT
WASHINGTON
COUNTY
DOCKET NO. S326-
77WnC

ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.
2. That Defendant's motion for a new trial on all issues is GRANTED.

B3

Dated at Montpelier, County of Washington, this
19th day of October 1980.

Thomas L. Hayes

Superior Judge

Willis C. Bragg

Assistant Judge

Patricia B. Jensen

Assistant Judge

APPENDIX C

STATE OF VERMONT	)	WASHINGTON
	:SS.	SUPERIOR
COUNTY OF WASHINGTON	)	COURT
		Docket No. S-
		326-77

GREENMOSS BUILDERS, INC.)

v.)

DUN & BRADSTREET, INC.)

POST-TRIAL MOTIONS UNDER RULES 50 AND
59

NOW COMES the defendant, by and through its attorneys, Young & Monte, and moves pursuant to Rules 50 and 59 that the Court:

1. Enter judgment for the defendant notwithstanding the verdict.
2. Enter judgment for the defendant on the issue of punitive damages notwithstanding the verdict.
3. Enter judgment for the defendant on the issue of compensatory damages notwithstanding the verdict.
4. Order a new trial of all issues in the above-captioned matter.

The within motions are made in the alternative and defendant expressly reserves its right to appeal the jury verdict in this matter.

Further, the defendant calls to the Court's attention for its consideration in the context of the within motions that Rule 59 requires that a new trial shall not be

granted solely on the ground that damages are excessive until the prevailing party has been given an opportunity to remit such portion thereof as the Court deems to be excessive.

Defendant has filed its memorandum in support of the within motions simultaneously with the filing hereof.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

DUN & BRADSTREET, INC.

By Its Attorneys

YOUNG & MONTE

By: Peter J. Monte

cc.: Thomas L. Heilmann, Esq.

D1

APPENDIX D

STATE OF VERMONT	)	WASHINGTON
	)	SUPERIOR
	)	COURT
COUNTY OF WASHINGTON	)	Docket No. S-
	)	326-77

GREENMOSS BUILDERS, INC.)
)
v.)
)
DUN & BRADSTREET, INC.)

**DEFENDANT'S MEMORANDUM IN SUPPORT
OF
POST-TRIAL MOTIONS UNDER RULES 50 AND
59**

. . . .

GROUND'S FOR RELIEF

1. *The Federal Constitution Requires a Clear Showing of Malice, Narrowly Defined, to Support Any Award of Punitive Damages.*

. . . .

4. *The Court's Instructions Permitted the Jury, Contrary to Constitutional Law, to Award Presumed Damages.*

D2

.....

DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

Respectfully submitted,
DUN & BRADSTREET, INC.

By Its Attorneys
YOUNG & MONTE

By: Peter J. Monte

E1

APPENDIX E

DUN & BRADSTREET, INC.

SPECIAL NOTICE

D-U-N-S

No. 06-675-5349

Jul. 26, 1976

Rating

NQ

Greenmoss Builders
Inc.

Formerly

Building Contractor

EE2

Box 517

Started

1971

RTE #100

SIC Nos.

Waitsfield, VT 05673 15 22 15 42 15 31

Tel. 802 496-3124

PETITION UNDER NATIONAL BANKRUPTCY ACT

Voluntary Petition In Bankruptcy Filed Under
Chapter IV

Date of Filing: July 1, Case # 76-201
1976

City & State Filed:
Burlington, VT

**Plaintiff's
2**

Filed By: Richard Brock

LIABILITIES:

Total: \$ 37,729

ASSETS:

Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT

Referee: Charles J. Marro, Merchants Row,
Rutland, VT

07-28(76 /34) 0056/02 6 092

This report is submitted only to J. Flanagan for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within 7 days.

F1

APPENDIX F

DUN & BRADSTREET, INC.

SPECIAL NOTICE

D-U-N-S

No. 06-675-5349

Aug. 3, 1976

Rating —

Greenmoss Builders
Inc.

Building Contractor Started 1971

Box 357

Rte. #100

SIC Nos.

Waitsfield, VT 05673 15 22 15 42 15 31

Tel. 802 496-2561

Plaintiff's 3

CORRECTION CORRECTION CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.

08-03(13 /29)0176/06 41501 6 092

This report is submitted only to _____
for the purpose of confirming accuracy and is not to be
exhibited or its contents revealed to anyone else. It
should be returned to Dun & Bradstreet, Inc. within
— days.

DEC 22 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

JOINT APPENDIX

GORDON LEE GARRETT, JR.	THOMAS F. HEILMANN
HANSELL & POST	THOMAS F. HEILMANN,
3300 FIRST ATLANTA TOWER	P.C.
Atlanta, Georgia 30383	Five Burlington Square
(404) 581-8000	P.O. Box 216
<i>Counsel for Petitioner</i>	Burlington, Vermont
	05402
	(802) 864-4555
	<i>Counsel for Respondent</i>

Petition for Writ of Certiorari Filed July 8, 1983
Certiorari Granted November 7, 1983

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**STATE OF VERMONT
WASHINGTON SUPERIOR COURT**

Greenmoss Builders, Inc., :
:
v. : Docket No. S326-77WnC
:
Dun & Bradstreet, Inc. :

Relevant Docket Entries

**Filing or
Order Date**

October 21, 1977	Summons, Complaint & Return of Service filed.
November 21, 1977	Entry of Appearance; Answer & First Defense-Sixth Defense filed by Peter Monte.
January 23, 1980	Motion to Dismiss as to the individual plaintiff, John Flanagan is GRANTED.
April 8, 1980	Defendant's Request to Charge Jury and Memo of Law Concerning Existence & Nature of Qualified Privilege filed by Attorney Monte.
April 9, 1980	Plaintiff's Request to Charge filed.

April 9, 1980

Plaintiff's Verdict

In this cause the jury on their oath say the Defendant is liable in manner and form as the Plaintiff has alleged in its complaint; They therefore find for the Plaintiff to recover of the Defendant \$350,000.00 dollars, damages.

If punitive damages are allowed and represent any portion of the total damages set forth above, please indicate below the dollar amount allowed for punitive damages,

\$300,000.00

Signed,

Vivian Bryan, Foreperson

April 22, 1980

Judgment filed and copies mailed to counsel.

April 30, 1980

Post-Trial Motions Under Rules 50 and 59 & Defendant's Memorandum in Support of Post-Trial Motions Under Rules 50 and 59 filed by Attorney Monte.

May 12, 1980

Hearing on all post-judgment motions; Hayes, J.; Hall, R.; Attorney Monte requested transcript of hearing per Reporter Hall.

October 20, 1980

Order filed and copies mailed to counsel;

It is hereby ORDERED and ADJUDGED:

That all motions of the Defendant for judgment notwithstanding the verdict are DENIED;

That Defendant's motion for a new trial on all issues is GRANTED.

October 29, 1980

Memorandum of Law & Petition for Permission to Appeal filed by Attorney Heilmann.

April 29, 1981

Order filed and copies mailed to counsel 4/29/81;

It is hereby ORDERED and ADJUDGED that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are GRANTED.

**SUPREME COURT OF THE STATE
OF VERMONT**

(Title omitted in printing)

Relevant Docket Entries

**Filing or
Order Date**

April 15, 1983

Order and Opinion of the Supreme Court of the State of Vermont dated April 15, 1983

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC.
and JOHN FLANAGAN

vs.

DUN & BRADSTREET, INC.

VERMONT
SUPERIOR
COURT
WASHINGTON
COUNTY
Civil Action
Docket No. _____

COMPLAINT

1. Plaintiff Greenmoss Builders, Inc., is a corporation organized and existing under the Laws of the State of Vermont with its principal place of business in Waitsfield, Vermont.

2. Plaintiff John Flanagan is a citizen and resident of Vermont residing in Waitsfield, Vermont. In 1971 plaintiff Flanagan created Greenmoss Builders and did business under said style until 1973 when Greenmoss Builders, Inc., was incorporated under the laws of the State of Vermont. Plaintiff Flanagan is the President, principal shareholder and prime moving force of said corporation. The members of the public in the community wherein the plaintiffs transact their business identify plaintiff Flanagan with Greenmoss Builders and acknowledge that plaintiff Flanagan as owner of said corporation, has a proprietary interest therein.

3. Defendant Dun and Bradstreet, Inc., is, upon information and belief, a corporation organized and existing under the Laws of the State of Delaware with its

principal place of business in New York. Among the business activities of defendant Dun & Bradstreet is the collection and dissemination of economic information concerning various business concerns to its subscribers.

4. On July 26, 1976, Dun & Bradstreet carelessly and negligently and with reckless disregard for the truth, informed its subscribers by means of a Special Notice, that Greenmoss Builders, Inc., had filed a voluntary petition in bankruptcy under Chapter 4 of the Bankruptcy Act. Defendant Dun & Bradstreet undertook no investigation to determine the truth of the information circulated by it which information was untrue at the time of circulation and remains untrue at present and which untruth, defendant Dun & Bradstreet would have discovered in the event it undertook any investigation of the matter.

5. In addition to the matters complained of in the preceding paragraph, by special notice dated July 26, 1976, defendant Dun & Bradstreet grossly misrepresented the assets and liabilities of the corporation and said misrepresentation was done in a careless and negligent manner with reckless disregard for the truth. Defendant Dun & Bradstreet undertook no investigation or examination of the truth of the matters asserted by it and had such investigation been undertaken the true state of the plaintiff's assets and business affairs would have been revealed.

6. As a direct and proximate result of the acts and omissions of the defendant as aforesaid, and as a further and direct and proximate result of its reckless disregard for the truth, plaintiff Greenmoss Builders, Inc., and plaintiff John Flanagan have suffered damage, embarrassment, humiliation, injury and loss to

their business reputations and status and standing in the community.

7. The false and defamatory statements referred to in Paragraphs #4 and #5 were published and circulated by defendant Dun & Bradstreet to members of the public and since they affect the plaintiffs in their trade or business, said erroneous statements constitute defamation and libel per se.

WHEREFORE, each plaintiff demands the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars each in compensatory damages and each plaintiff demands the sum of Fifteen Thousand (\$15,000.00) Dollars each in punitive or exemplary damages from defendant.

Pursuant to Rule 38 V.R.C.P. plaintiffs Greenmoss Builders Inc., and John Flanagan herein demand a trial by jury as of all issues triable in this cause.

Dated at City of Barre, County of Washington and State of Vermont this 13th day of October, 1977.

By: THOMAS F. HEILMANN, ESQ.

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON
SUPERIOR
COURT
Docket No.: S-
326-77Wnc

GREENMOSS BUILDERS, INC.)
and JOHN FLANAGAN)

vs.)

ANSWER

DUN & BRADSTREET, INC.)

NOW COMES Dun & Bradstreet, Inc., by and through its attorneys Young & Monte, and for its answer to plaintiffs' complaint says as follows:

FIRST DEFENSE

1. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 1 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

2. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 2 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

3. Defendant admits the allegations of Paragraph 3 of plaintiffs' complaint.

4. Defendant denies each and every allegation contained in Paragraph 4 of plaintiffs' complaint.

5. Defendant denies each and every allegation contained in Paragraph 5 of plaintiffs' complaint.

6. Defendant denies each and every allegation contained in Paragraph 6 of plaintiffs' complaint.

7. Defendant denies each and every allegation contained in Paragraph 7 of plaintiffs' complaint.

SECOND DEFENSE

8. This court lacks jurisdiction over the subject matter of this cause and lacks jurisdiction over the person of the defendant.

THIRD DEFENSE

9. The complaint fails to state a claim upon which the plaintiff, John Flanagan, can be granted relief against the defendant.

FOURTH DEFENSE

10. The complaint fails to state a claim upon which the plaintiff, Greenmoss Builders, Inc., can be granted relief against the defendant.

FIFTH DEFENSE

11. Any allegedly defamatory statement which the plaintiffs claim was made by the defendant and is the cause of any alleged injury to the plaintiffs was made by the defendant in good faith in the course of its business as a commercial credit rating and reporting agency, and any such allegedly defamatory statement was made by the defendant only in response to a legitimate request for credit information made of the defendant by one of its subscribers. Any such alleged defamatory statement is therefore the subject of a

privelege, which privelege the defendant claims the benefit of.

SIXTH DEFENSE

12. All statements allegedly made by defendant pertaining to plaintiffs were true.

WHEREFORE, defendant prays:

1. The plaintiffs' complaint be dismissed.
2. That plaintiffs be ordered, pursuant to Rule 9(b), to plead with more particularity the statements alleged to have been made by defendant which were defamatory.
3. That judgment be entered for the defendant.
4. That defendant be awarded its costs, including a reasonable attorney fee.
5. For such other and further relief as is just.

DATED at Northfield, County of Washington and State of Vermont this 18th day of November, 1977.

DUN & BRADSTREET, INC.
By Its Attorneys
YOUNG & MONTE

By Peter J. Monte, Esquire

**STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)**

DUN & BRADSTREET, INC. SPECIAL NOTICE
D-U-N-S

No. 06-675-5349 Jul. 26, 1976 Rating NQ
Greenmoss Builders Formerly
Inc.

Box 517 Building Contractor EE2
RTE #100 SIC Nos. Started 1971

Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-3124

**PETITION UNDER NATIONAL BANKRUPTCY
ACT**

**Voluntary Petition In Bankruptcy Filed Under
Chapter IV**

Date of Filing: July 1, Case # 76-201
1976

City & State Filed:
Burlington, VT

Plaintiff's 2

Filed By: Richard Brock

LIABILITIES:

Total: \$ 37,729

ASSETS:

Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT
Referee: Charles J. Marro, Merchants Row,
Rutland, VT

07-28(76 /34) 0056/02 6 092

**This report is submitted only to J. Flanagan for the
purpose of confirming accuracy and is not to be exhib-
ited or its contents revealed to anyone else. It should
be returned to Dun & Bradstreet, Inc. within 7 days.**

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)

DUN & BRADSTREET, INC.**SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349
Greenmoss Builders
Inc.

Aug. 3, 1976

Rating —

Building Contractor Started 1971

Box 357

Rte. #100

SIC Nos.

Waitsfield, VT 05673 15 22 15 42 15 31

Tel. 802 496-2561

Plaintiff's 3

CORRECTION CORRECTION CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.

08-03(13 /29)0176/06 41501

6 092

This report is submitted only to _____
for the purpose of confirming accuracy and is not to be
exhibited or its contents revealed to anyone else. It
should be returned to Dun & Bradstreet, Inc. within
— days.

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)
EXCERPTS FROM INSTRUCTIONS TO JURY

* * *

[Tr. 484] Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report [Tr. 485] issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish

it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to [Tr. 486] its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving [Tr. 487] that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that

Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be [Tr. 488] awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as [Tr. 489] an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances.

Now in defamation actions, the law requires that you consider whether the Defendant has taken any steps to mitigate damages. Mitigation of damages is action taken by the Defendant to lessen the extent or severity of the injuries sustained by the Plaintiff because of Defendant's conduct. If you find that the Defendant took steps to alleviate damages or lessen the extent or severity of Plaintiff's damages, then you must take this mitigating conduct of the Defendant into account in determining the amount of damages and you must lessen your award as I've indicated to the extent that you believe is appropriate in all the circumstances.

[Tr. 490] Now ordinarily in a civil case one is not allowed to bring before the the jury the wealth of the Defendant or even to make any suggestions as to the wealth of the Defendant. And in considering whether or not Defendant is liable, you may not take into account Defendant's wealth. In considering what compensatory damages must be, if you reach that question, you may not take into account Defendant's wealth, but if you feel that there has been such outrageous conduct as would warrant punitive damages, then and only then may you take into consideration the wealth of the Defendant.

* * *

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC.	)	WASHINGTON
	)	SUPERIOR
vs	)	COURT
	)	Docket No. S-
DUN & BRADSTREET, INC.	)	326-77Wnc

JUDGMENT

This action came on for trial before the Court and a jury, Thomas L. Hayes presiding, and the issues having been duly tried and the jury on April 10, 1980, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of \$350,000.00,

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of \$350,000.00 and its costs of action.

Dated at Montpelier, Vermont this 21st day of April, 1980.

Thomas L. Hayes

Hon. Thomas L. Hayes

Willis C. Bragg

Hon. Willis C. Bragg

Patricia B. Jensen

Hon. Patricia B. Jensen

STATE OF VERMONT
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS

V

DUN & BRADSTREET

SUPERIOR COURT
WASHINGTON
COUNTY
DOCKET NO. S326-
77WnC

ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.
2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th
day of October 1980.

Thomas L. Hayes

Superior Judge

Willis C. Bragg

Assistant Judge

Patricia B. Jensen

Assistant Judge

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS,)	
INC.	)	WASHINGTON
	)	SUPERIOR
V.	)	COURT
	)	DOCKET NO.
DUN & BRADSTREET	)	S326-77 WnC

ORDER

The above-entitled cause came on before the Washington Superior Court on Plaintiff's Petition for Permission to Appeal, which petition was opposed by the Defendant. However, the Defendant requested that, if this Court grants permission for an interlocutory appeal, that said appeal include certain questions specified by the Defendant.

The Court finds, after considering the petition and the alternative requests made by the Defendant, that there exist controlling questions of law as to which there is substantial ground for difference of opinion concerning the Court's October 19, 1980 Order granting Defendant's motion for a new trial on all issues. The Court also finds that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Accordingly, it is hereby ordered and adjudged that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are granted to the extent set forth below. The Clerk shall proceed as provided in Rules 3e and 5b (3) of the Vermont Rules of Appellate Procedure.

The controlling questions of law are as follows:

1. Did the Court err in granting Defendant's motion for a new trial on all issues?

2. If the answer to the previous question is in the affirmative, should the Court have entered judgment on the verdict?

3. If the answer to Question No. 1 is in the affirmative, should the Court have ordered a new trial on:

- a) damages only?;
- b) compensatory damages only?;
- c) punitive damages only?

4. Did the Court err in denying all motions of the Defendant for judgment notwithstanding the verdict?

5. If the answer to the previous question is in the affirmative, should the Court have:

a) granted Defendant's Motion to enter judgment for the Defendant on the issue of punitive damages, notwithstanding the verdict?;

b) granted the motion of the Defendant for judgment on the issue of compensatory damages, notwithstanding the verdict?;

c) granted judgment for the Defendant on all issues?

Dated this 26th day of April, 1981.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

**SUPREME COURT OF THE STATE
OF VERMONT**

ENTRY ORDER

**SUPREME COURT DOCKET NO. 173-81
NOVEMBER TERM, 1982**

<p>Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.</p>	}	<p>APPEALED FROM: Washington Superior Court</p> <p>DOCKET NO. S326- 77WnC</p>
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In the above entitled cause the Clerk will enter:

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

Dissenting:

FOR THE COURT:

William C. Hill
WILLIAM C. HILL,
Associate Justice

Concurring:

Albert W. Barney
ALBERT W. BARNEY,
Chief Justice

Franklin S. Billings, Jr.
FRANKLIN S. BILLINGS, JR.,
Associate Justice

Wynn Underwood
WYNN UNDERWOOD,
Associate Justice

Louis P. Peck
LOUIS P. PECK,
Associate Justice

No. 173-81

Greenmoss Builders, Inc. Supreme Court

v. On Appeal from
Washington Superior
Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.

Villa & Heilmann, Burlington, for plaintiff-appellant
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood
and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for \$50,000 in compensatory or actual damages, and \$300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid \$200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No pre-publication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc.*, *supra*, the Supreme Court, in the last major pronouncement of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth." *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 88 (1978); *Harley Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), cert. denied, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley*, *supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that *Gertz* does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

Id. at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz*, *supra*; *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz*, *supra*; *Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues" *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan*, *supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see Prosser, *Law of Torts*, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

Id. at 32. Although we have never expressly denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable" *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel*, *supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard*, *supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

Corporation, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,'" *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki*, *supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 157, 130 A. at 789.

IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.¹ There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

¹ In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

WILLIAM C. HILL
Associate Justice

No. 83-18
IN THE
Supreme Court of the United States
October Term, 1983

Office - Supreme Court, U.S.
FILED
AUG 11 1983
ALEXANDER L. STEVAS.
CLERK

DUN & BRADSTREET, INC.,

Petitioner,

vs.

GREENMOSS BUILDERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Vermont

**RESPONDENT'S OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF VERMONT**

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OPINIONS BELOW

The Charge to the Jury delivered by the Superior Court of Washington County, Vermont, is unreported. The pertinent portions thereof are printed in Respondent's Appendix at A1-A4.

STATEMENT OF THE CASE

1. The Facts.

On July 26th, 1976, Respondent, Dun & Bradstreet, Inc., (hereinafter D & B), published a notice that Respondent, Greenmoss Builders, Inc. (hereinafter Greenmoss) had filed a voluntary Petition in Bankruptcy. It is conceded that this report was totally false and groundless. In addition to falsely reporting that Greenmoss had filed bankruptcy, Petitioner grossly understated the assets and liabilities of Respondent. This report was so completely inconsistent with previous reports about Greenmoss obtained by D & B, particularly with respect to assets and liabilities, that D & B knew or should have known that the information about Greenmoss's bankruptcy was inaccurate.

The report was published because Petitioner's employee, a 17-year-old high school student who had been given no training by D & B, had mistakenly analyzed a Bankruptcy Petition filed in the United States District Court for the District of Vermont and inaccurately attributed the Bankruptcy Petition to Greenmoss. The evidence was that prior to the issuance of a credit report indicating a bankrupt business, D & B's routine practice and requirements mandated a check of the report's accuracy with the business

alleged to be bankrupt. D & B admitted that no pre-publication verification was ever attempted in this case.

Prior to the commencement of suit, D & B steadfastly refused to divulge to Greenmoss the names of the persons who had received the report. D & B's so-called corrective notice was forthwith objected to by Greenmoss as absolutely inadequate and requests by Greenmoss for a more comprehensive retraction notice were refused. Thereafter, without any factual basis, D & B changed the credit rating which it had previously established for Greenmoss and engaged in other persistent activity which adversely reflected on Respondent's creditworthiness.

2. The Proceedings Below.

The posture of the parties in this case is that Greenmoss is a "private" plaintiff, that is, a purely private figure as opposed to a public figure or public official. The Defendant concedes it is a non-media defendant engaged in the business of commercial credit reporting and admits it is not a consumer reporting agency. The defamatory statements of the Petitioner did not involve an issue of public interest. Commercial private speech is involved rather than public speech.

Petitioner's Answer to the Complaint and Affirmative Defenses, filed some two and one-half years before trial, asserted no Constitutional argument in defense of its actions. Indeed, not until the morning the trial commenced did D & B assert that the First and Fourteenth Amendments to the U.S. Constitution had any application in this case or that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), had any bearing on this litigation.

Prior to the jury's decision, Petitioner did not assert *Gertz* as an independent basis for protection. On the contrary, D & B took the position at the trial that, as a commercial credit reporting agency, it was entitled to the protection of a common law qualified privilege to defame. It was only in the context of the common law qualified privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had application to this litigation. Petitioner did not contend at the Trial Court level that it was entitled to *both* the protection of *Gertz* and the protection of the common law qualified privilege; it characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege.

Petitioner's requests to charge the jury, which the Trial Court adopted over the objection of Greenmoss, did not request a specific charge based on *Gertz*. D & B's requests were couched in the context of the qualified privilege existing at common law.

Subsequent to trial, Petitioner first asserted that the First and Fourteenth Amendments had independent application to this case and that *Gertz* should be extended to encompass non-media defendants.

In adopting D & B's requests for instructions to the jury, the Trial Court clearly and specifically negated any opportunity of Greenmoss to recover damages resulting from any presumption under defamation *per se* doctrines. The Court instructed the jury that a qualified privilege to defame protected D & B and that Greenmoss had the burden of proving the privilege was destroyed. The charged stated that:

The conduct which would destroy the qualified

privileges of a commercial credit agency *must be more than mere negligence or want of sound judgment. It must show malice* or lack of good faith on the part of the defendant. If you find that the Defendant acted in bad faith towards the Plaintiff in publishing the erroneous report or that the Defendant intended to injure the Plaintiff in its business or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it. Respondent's Appendix A3. (Emphasis added.)

Significantly, Petitioner fails to point out to this Court that the Vermont Supreme Court specifically ruled that the charge not only afforded D & B the common law qualified privilege extended to credit reporting agencies but also gave it the benefits of the Constitutional privilege outlined in *Gertz*. The Vermont Supreme Court's decision states that:

[W]e have carefully reviewed the jury instructions and in addition to being properly charged in line with our common law rules as to liability and damages, Defendant (D & B) was afforded a common law qualified privilege against credit reporting agencies *along with the ill-charged Constitutional privilege outlined in Gertz. In short, Defendant has nothing*

to complain about, since it received two beneficial charges to which it was not entitled. Petitioner's Appendix A16 (emphasis added).

Accordingly, the Vermont Supreme Court has construed the instructions to the jury, *as a matter of fact and law*, to have included the *Gertz* standards. The Trial Court's instructions prevented Respondent from recovering any award of damages, either compensatory or punitive, unless the qualified privilege and the *Gertz* standard were satisfied.

SUMMARY OF ARGUMENT

The Vermont Supreme Court has ruled that the instructions to the jury were consistent with *Gertz*. Accordingly, the issue whether the First Amendment's limitations on damages for libel are applicable to non-media defendants in suits brought by purely private plaintiffs is not squarely before this Court since, as a pre-condition to considering this issue this Court must override the factual and legal conclusions of the Vermont Supreme Court.

Secondarily, this Court must determine whether the Petitioner appropriately presented the Trial Court with an opportunity to rule on the application of *Gertz* since *Gertz* was not presented as an independent basis for protection at the trial court level.

Thirdly, the issues in this case are of such minor significance in the overall structure of the law that their resolution by this Court is unnecessary. Accordingly, there is no substantial Federal question before this Court and there are no special or important reasons for the grant of Certiorari. As this Court has recognized, the entire law of defamation has not been preempted by federal Constitutional standards.

Fourthly, the result below was accurate, correct and the right result was reached. Finally, the result below was fair since Respondent won its case despite two jury instructions which heavily favored Petitioner including one which it erroneously contends was not given.

REASONS FOR DENYING THE WRIT

1. The Questions Presented For Review Are Not Squarely Before The Court.

Petitioner suggests that the issue of First Amendment protection for a non-media defendant in a suit by a purely private plaintiff is clearly before the Court in this cause. In fact, that issue is not squarely before this Court because several crucial pre-conditions to its consideration, which pre-conditions are factual in nature, must be addressed and resolved favorably to Petitioner prior to consideration of any Constitutional issue.

The first and most apparent obstacle to consideration of any Constitutional question is one not mentioned by Petitioner, namely, the finding of fact and legal conclusion of the Vermont Supreme Court that the standards established in *Gertz* were afforded to Petitioner in the instructions to the jury. Although *Gertz* should not be extended to non-media defendants, the jury charge not only was consistent with *Gertz* but exceeded the *Gertz* standards. *Gertz* requires that fault be shown to justify compensatory damages but stops short of ruling that the *New York Times v. Sullivan* standard of malice applies to compensatory damages. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). The trial court's charge required the jury to find that there was

malicious or reckless publication of the report before *any* damages, including compensatory damages, could be awarded. The trial court's methodology was to impose the *New York Times v. Sullivan* standard of knowledge of falsity or reckless disregard of truth or falsity as a prerequisite to recovery of any damages. This standard was instructed in connection with the quantum of proof necessary to overcome the qualified privilege at common law of a credit reporting agency which the trial court extended to D & B.

By making the *New York Times* standard of malice an essential ingredient of its charge on the question of the qualified privilege, the court thus proscribed any recovery whatsoever, including recovery of compensatory damages, unless Greenmoss proved that D & B's actions met the *New York Times* standard. This included any recovery under the theory of libel *per se*.

Gertz acknowledges that in order to recover actual or compensatory damages, a plaintiff need not satisfy the *New York Times* standard of Constitutional malice. Indeed, under *Gertz*, even a negligence standard is permissible. However, in order to recover presumed or punitive damages, the *New York Times* standard must be met. Thus, even if *Gertz* does apply, the charge, when read as a whole, clearly presented the jury with not only the ingredients necessary to satisfy the *Gertz* test, but in fact exceeded the standards required by *Gertz* since *no* liability could be found and no damages of any nature could be awarded without satisfying the *New York Times* standard.

In reviewing the jury instructions, the Vermont Supreme Court held that the jury was instructed in accordance with

the Constitutional privileges outlined in *Gertz*. The Court observed that Petitioner received the benefits of this charge even though it was not entitled to it.

Thus, the initial consideration here does not, as Petitioner contends, involve a Constitutional question, but rather, a factual inquiry, namely, whether the Vermont Supreme Court correctly concluded as a matter of fact that the trial court's charge included the *Gertz* requirements. To reach the questions urged by Petitioner, this Court must first resolve against the Vermont Supreme Court and in favor of Petitioner a question of fact which has been decided by the highest court of the State construing a jury charge delivered by one of its Trial Courts. In addition to being a factual conclusion, the ruling of the Vermont Supreme Court on this point constitutes a legal interpretation by the State's highest court of the impact and legal effect of the jury instructions taken as a whole. *Curtis Publishing v. Butts*, 388 U.S. 130 (1975), mandates that the impact of a jury instruction must not be ascertained by merely considering isolated statements but must take into consideration all of the instructions given and the tendency of the proof of the case. The Vermont Supreme Court has followed *Butts* in ruling that Petitioner received the benefits of the *Gertz* standards in the charge.

Accordingly, even if the extension of *Gertz* to non-media defendants in "private figure" cases raises a substantial constitutional question, this case is not an appropriate vehicle for the resolution of the issue.

2. Petitioner Failed To Raise The Constitutional Questions In This Petition With Sufficient Clarity In The Proceedings Below.

Another obstacle to utilization of this case for consideration of the extension of *Gertz* to private plaintiff-non-media defendant actions is that Petitioner did not present the trial court with a sufficient opportunity to rule upon the questions which are presented for review here.

Prior to the rendition of the verdict, Petitioner never claimed that it was entitled to the protections of *both Gertz* and the common law qualified privilege made available by some courts to commercial credit rating agencies. Petitioner's Answer and Affirmative Defenses submitted to the Lower Court in November, 1977, asserted only a qualified privilege granted to credit reporting agencies. No Constitutional defense was asserted before trial. On the day trial started, Petitioner submitted its requests to charge the jury, (Respondent's Appendix B1-4) together with a memorandum entitled "Defendant's Memorandum of Law Concerning Existence and Nature of Qualified Privilege" (Respondent's Appendix C1-6). Petitioner argued therein that, in addition to the common law, to which it devoted most of its attention, an additional basis *for the existence of the qualified privilege* was the First and Fourteenth Amendments to the United States Constitution. Petitioner's Memorandum on the Existence and Nature of the Qualified Privilege gave scant attention to *Gertz* and presented *Gertz* as a subset or function of the qualified privilege and not as an independent ground for protection against libel complaints.

Accordingly, this case was tried as a common law libel

case with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense and had no overtones of First Amendment protection. Significantly, the Court charged the qualified privilege virtually as requested by Petitioner. There was nothing to indicate to the trial court that Petitioner was requesting *Gertz* be extended to non-media defendants as an independent ground of defense. Petitioner never put the trial court on sufficient notice that it claimed a separate basis for absolution from liability grounded on the Constitution.

Respondent submits that the point which Petitioner now seeks to raise was not adequately presented to the trial court. The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. As a matter of State law, this issue has been forfeited consistent with the decisions of the Vermont Supreme Court concerning a party's responsibility to present its position to the trial court with sufficient clarity and precision. See *Scanlon v. Hopkins*, 128 Vt. 626, 270 A.2d 352 (1970); *Dodge v. McArthur*, 126 Vt. 81, 223 A.2d 453 (1966). The Constitutional issue asserted here does not rise to the level of the "glaring error" test which forgives a party from its advocacy responsibility. *State v. Stockwell*, 142 Vt. 232; ___A.2d___ (1982); *State v. Towne*, 142 Vt. 241, ___A.2d___ (1982).

3. The Issues Presented Are Not Sufficiently Important To Warrant Review By This Court.

Grant of a Writ of Certiorari requires the exercise of this Court's extraordinary and discretionary jurisdiction. This case is simply of insufficient importance in the overall

structure of the law to merit resolution by the Court at this time. This case does not involve issues of major public import. Insofar as the law of libel is concerned, Greenmoss is neither a public official nor a public figure and D & B is, by its own admission, a non-media defendant and is not a consumer reporting agency. The content of the Petitioner's "speech" is clearly not public speech but rather is exclusively private, commercial speech.

Mercantile credit reports have generally been treated as private commercial expressions. As such, they are entitled to lesser protection than other Constitutionally guaranteed expressions. *Central Hudson Gas and Electric Company v. Public Service Commission*, 447 U.S. 557, 562-63 (1980); *Pittsburgh Press Company v. Human Relations Commission*, 413 U.S. 376, 384 (1972).

The issue sought to be reviewed is not whether *Gertz* applies to purely private plaintiffs and non-media defendants who are involved in defamation litigation, but rather, whether *Gertz* should be extended to defamation actions involving such parties. *Gertz* makes clear that the law of defamation is not to be solely decided by federal Constitutional standards. Indeed, in *Miskovsky v. Oklahoma Publishing Company*, ___U.S.___ (1982) (no. 81-2407) (*denying cert.*), Mr. Justice Rehnquist observed that the entire law of defamation has not been preempted by federal Constitutional standards.

It does not help Petitioner to contend that the narrow issue in this case has not been resolved by this Court. There is no valid reason why the matter should be resolved by this Court. The fact that a given question has not been addressed has never been a recognized basis for the granting of Certiorari.

In two cases presented to the Court in the 1982 term, issues virtually identical to that submitted by this Petitioner were presented and Certiorari was denied. *Williams v. Pasma*, __Mont.__, 656 P.2d 212, *cert. denied* __U.S.__ (1983) (no. 82-1640); *Mertz v. Denny*, 106 Wisc.2d 636, 318 N.W.2d 141, *cert. denied*, __U.S.__ (1982) (no. 81-2376). The issue presented by Petitioner is a narrow issue, not broad enough to warrant review by this Court. The issue does not involve the press and does not involve the institution of the freedom of the press. It does not involve public figures or public officials. The facts of the case are not of public concern nor are they of national or intense local concern. This is simply dispute resolution between two private parties which involves a minute thread of the fabric of defamation law. No compelling reason exists for the exercise of this Court's energies to explore such an arcane area.

The scenario Petitioner portrays is that there is considerable disarray in the State and lower Federal Courts concerning the questions presented for review. However, a comparison of the issues in the cases cited by Petitioner with the questions in this Petition dramatically minimizes the claims of conflict. It is important to recognize that this case presents a purely private plaintiff and a non-media defendant which is not a consumer reporting agency. In addition, the defamation was not over an issue of public concern.

Petitioner cites *Avins v. White*, 627 F.2d 637 (3rd Cir.), *cert. denied*, 449 U.S. 982 (1980) in support of its position. However, *Avins* involved a plaintiff who was a public figure suing a private individual and the matter involved an issue

of serious public importance. The Court of Appeals for the Third Circuit specifically stated that it was *not* deciding whether the *New York Times* privilege extends to all private individual defendants regardless of the context and took pains to distinguish its result from its previous decision in *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.), *cert. denied*, 404 U.S. 898 (1971) in which it was held that the *New York Times* standard does not apply to disseminations made by a private credit reporting agency.

Similarly, *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), also relied upon by Petitioner, is a case involving a plaintiff who was a public figure and a defendant who, although being a "private" defendant, was also a newspaper reporter who made defamatory statements to a number of people in the course of his preparation for a news story involving a matter of public concern. The Court in *Davis* does not specifically hold *Gertz* applicable to non-media defendants. The Court's ruling turned on plaintiff's status as a public official.

Woy v. Turner, 533 F. Supp. 102 (N.D. Ga. 1981) involved a plaintiff who was a public figure. The Court's focus in *Turner* was whether the plaintiff was a public figure, not whether *Gertz* applied to a non-media defendant.

The same analysis was utilized in *Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980) in which the holding was specifically limited to defamation cases involving a public official or public figures. Interestingly, *Bussie* took pains to distinguish *Grove v. Dun & Bradstreet, Inc.*, *supra*.

Throughout this litigation, Petitioner has placed extraordinary reliance upon *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). *Jacron* acknowledges

that the opinion in *Gertz* does not apply to non-media defendants. Curiously, however, *Jacron* relies upon the now rejected plurality theory of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) to support its position. Finally, *Jacron* applied the *New York Times* standard to a non-media defendant solely as a matter of Maryland state law and "wholly apart from any possible Supreme Court holding in the future based on Constitutional grounds." See *Jacron Sales Co. v. Sindorf*, 350 A.2d at 695-96. The Oregon Supreme Court in *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (Or. 1977) characterizes *Jacron* as a "most peculiarly reasoned case."

Decisions adjusting the rights of public figures and public officials as plaintiffs are totally inapposite to this case and it is fruitless to lump them together since different Constitutional considerations apply to public figures and public officials as plaintiffs in libel actions. See Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1419 (1975).

It has been suggested that, since *Gertz*, this court has consistently denied Certiorari or summarily dismissed appeals in defamation cases which could have served as vehicles for clarifying unresolved or questionable doctrinal issues. This has led some commentators to conclude that this Court, recognizing that all issues of defamation law do not have to be resolved with exclusive reference to federal Constitutional standards, has, consistent with its statements in *Gertz*, permitted the states to develop substantive defamation law. See Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, Rutgers-Camden Journal, 519, 520-22 (1979).

4. The Decision Below Gave Full Consideration To the Issues and Decided Them Correctly.

It seems clear that *Gertz* is exclusively a media decision. The repeated emphasis to the "media," "the press," "broadcasters," the "communications media," and the like leave no ambiguity as to whether the rules fashioned in *Gertz* were meant to extend beyond the press. They simply were not. See Eaton, *supra* at 1417. Indeed, it has been posited by Mr. Justice Stewart that *New York Times* and its progeny, including *Gertz*, do not suggest that the Constitutional theory of free speech gives an individual any immunity from liability for libel or slander. Instead, Mr. Justice Stewart has observed that *New York Times* and succeeding cases have nothing to do with freedom of speech but rather advance freedom of the press theorems solely. See Stewart, *Of The Press*, 26 Hastings L.J. 631, 635 (1975). Accordingly, Respondent submits that *Gertz* does not turn on free speech theory and rather is described more properly as a freedom of the press case. Its principles are therefore applicable only to the media. See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 916, 930 (1978). Thus considered, *Gertz* has no application whatsoever to the instant litigation.

Even if free speech is involved in these cases, the Vermont Supreme Court correctly recognized that a balancing test between the legitimate rights of a defamed plaintiff and the Constitutional interest which may be threatened if the defendant is held financially accountable for its actions must be utilized in applying First Amendment protections in defamation cases. The Court

properly recognized that in private plaintiff-non-media defamation actions, the crucial elements which have brought the First Amendment into the field of defamation law are missing. In non-media defamation, there is no threat to the free and robust debate of public issues. There is no potential interference with meaningful dialogue of ideas concerning self-government and there is no threat of liability causing a reaction of self-censorship by the press. As *Gertz* itself recognizes, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues.' " *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan, supra*, 376 U.S. at 270).

In the same paragraph in which this Court announced its holding in *Gertz*, it stated, "It (the holding) recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, it shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 348. To provide a commercial business such as *Dun & Bradstreet*, which scrupulously limits who receive its commercial messages, with all the privileges available under the *New York Times* standard as well as the privileges which may be available to it at common law, would be a socially undesirable result at odds with the balancing test employed by the Court in *Gertz*. Uniformity has never been the blind quest of the law, yet Petitioner's essential argument here seeks to have the bland brush of symmetry render opaque the subtle factors which go into the Constitutional balance.

Petitioner's business involves very limited access publications. They are not designated to provide information on a general basis to the public at large.

Indeed, their purpose is to the contrary and is opposed to the *New York Times* rationale of free and uninhibited debate since their use is conditional upon maintaining confidentiality.¹

When viewed from the Defendant's perspective, there is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. Furthermore, Petitioner controls its audience and the scope of its publications in advance of the publication. Thus, no difficulty exists in distinguishing between media and non-media defendants on the facts of this case.

Gertz emphasizes the legitimate interests that states have in protecting private individuals from defamation. This has been a long-standing and clearly settled doctrine in Vermont. See *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897); *Michlin v. Roberts*, 132 Vt. 154, 318 A.2d 163 (1974); *Lancour v. Herald and Globe Association*, 112 Vt. 471, 28 A.2d 396 (1942). With media defendants, a private individual's right to recover for libel has been made more difficult because his interests have been outweighed by important constitutional issues. It does not follow that where those constitutional values are not involved recovery should face the same obstacles. Arguments based on simplicity and homogeneity have no place in the balancing test this Court has mandated for assessing the role of the First Amendment in defamation cases.

Simply stated, when the competing interests are placed on the scale, the strong and legitimate state policy of protecting individual reputations, which the Vermont Courts have long recognized, makes downweight and fully justifies

¹See e.g., The conditions for use appearing at the bottom of Petitioner's Appendices E and F.

the decision below. The reputational interest, when considered against the interest of this Petitioner, properly and correctly inclines the scales to the conclusion reached by the Vermont Supreme Court. Indeed, Respondent submits that none of the factors which this Court utilized in applying First Amendment protections in *Gertz* are, when properly considered, available to this Petitioner. This Petitioner had a self-regulating mechanism to limit possible damage to reputations in the form of its pre-publication verification policy which it failed to utilize in this case. Moreover, this Petitioner, by virtue of its subscription system, has much greater flexibility in choosing how broad or limited a forum to use in its communications; it can and does direct its information to a select few whom it knows about in advance. These considerations are totally different than those which arise when media speakers such as the press and broadcast media are involved.

5. The Correct Result Was Reached By The Court Below.

Even if the principles set forth in *Gertz* should be extended to a purely private plaintiff against a non-media defendant, it is submitted that the result below is entirely correct. As respects compensatory damages, *Gertz* merely requires that states do not impose liability without fault. In media cases after *Gertz*, most states have employed a negligence standard. Indeed, the *Gertz* decision seems to have anticipated that a negligence standard would be utilized for media defendants. See *Denny v. Mertz*, 106 Wisc.2d 836,

318 N.W.2d 141, *cert. denied*, __U.S.__, 103 S.Ct. 179 (1982) and cases cited therein.

In this cause, the trial court, despite its statement that Petitioner's publication constituted libel *per se*, prohibited the jury from awarding any damages, either compensatory or punitive, unless serious fault was shown. The fault required in the charge went well beyond negligence. Thus, to return its verdict, the jury must have found that Petitioner's actions constituted far more than merely negligence. The jury's findings that punitive damages were justified based on an instruction clearly consistent with *Gertz* leads to the conclusion that the jury was convinced Petitioner's actions constituted reckless disregard for the truth or falsity of the matter. Beyond that, Petitioner's opening statements to the jury and its briefs to the Vermont Supreme Court admitted it was negligent in connection with the publication of the report. Irrespective of Petitioner's concession of negligence, the evidence in this case is overwhelming that its conduct constituted, at the very minimum, negligence. Since negligence is a satisfactory standard to be adopted in determining compensatory damages under *Gertz*, Petitioner was clearly negligent and no retrial of this matter is necessary to establish such negligence.

As respects punitive damages, the Court charged that in order to get to the question, the jury must find actual malice, malice being defined with reference to the *New York Times* standard, must be proved by a clear preponderance of the evidence. This was clearly correct. Thus, even if *Gertz* were to extend to this action, the only modification in the charge would be that Greenmoss would have to prove negligence to support its compensatory damage verdict. Negligence abundantly exists here and has been admitted by Petitioner.

Therefore, the result below is correct. A restructuring of this case is unfair to Respondent, will not assist Petitioner and is a gesture of symbolism only.

**6. A Fair And Appropriate Result
Was Reached Below.**

In this cause, the trial court instructed the jury in a manner consistent with *Gertz* as the Vermont Supreme Court held. In addition, it charged that, as a credit reporting agency, Petitioner enjoyed a common law qualified privilege to defame. This was an open question in Vermont at the time. Not only did the trial court instruct as to the existence of a common law privilege, but, in adopting Petitioner's request to charge on the scope of the privilege, delivered an instruction that strongly favored the Petitioner and highly disadvantaged the Respondent. Of the cases construing the credit reporting agency privilege in other jurisdictions, the lower court selected a standard that was the most favorable to Petitioner of all the decided cases. *See, e.g., Restatement, (Second) Torts §595*. Despite this rather Draconian charge, Respondent prevailed.

The Vermont Supreme Court ruled, solely as a matter of state common law, that a credit reporting agency does not have a qualified privilege to defame and therefore, D & B received at least two jury instructions to which it was not entitled. Although Petitioner has, appropriately, not asserted the ruling of the Vermont Supreme Court concerning the common law privilege as a question for review here, the trial court's inclusion of that instruction and the jury's subsequent verdict despite the instruction, demonstrate that the result below is fair and appropriate

considering the facts of this case. It also demonstrates that the application of *Gertz* to this case would not benefit the Petitioner in any consequential respect. Under the trial court's charge, Respondent had to show malice to recover any verdict whatsoever. Thus, the Petitioner was, at the trial level, afforded even more protection than it now claims it was deprived of.

CONCLUSION

This case does not present an appropriate vehicle for the resolution of the questions urged by Petitioner. Moreover, those questions are not significant or important and, in view of the facts in this case, are at best artificial and hypothetical. The petition ignores that a jury charge more stringent than *Gertz* mandates was in fact delivered to the jury.

Petitioner makes this case out to be more than it actually is and seeks to exalt uniformity over logic which is inimical to the balancing methodology employed in First Amendment defamation litigation. Lastly, Petitioner cannot show that any different outcome would have occurred in the proceedings below. For all of the foregoing reasons, the Petition for Certiorari should be denied in its entirety.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT WASHINGTON COUNTY MARCH TERM

GREENMOSS BUILDERS

vs.

DUN & BRADSTREET

*
*
*
*
*

DOCKET NO. S326-77Wnc

JURY CHARGE

* * * *

Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in

its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit

information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequence, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefor relieves the Plaintiff of the burden of establishing by specific proof that

damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgement you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages *actually* caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not *privileged*, and if you also find, on the basis of *clear and convincing evidence*, that the Defendant acted with *actual malice* in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the *actual* damages assessed.

APPENDIX B

STATE OF VERMONT) WASHINGTON SUPERIOR COURT
) :SS.
COUNTY OF WASHINGTON) Docket No. S-326-77 WnC

GREENMOSS BUILDERS, INC.)
)
) v.)
)
DUN & BRADSTREET, INC.)

DEFENDANT'S REQUESTS TO CHARGE JURY

NOW COMES DUN & BRADSTREET, INC., defendant in the above-captioned action, by and through its attorneys, Young & Monte, and requests pursuant to Rule 51(b) the following charges to the jury:

1. You may not return a verdict against the defendant merely because defendant published an erroneous report of plaintiff's bankruptcy if you find that the circumstances of this publication were such that a qualified privilege exists. Thee law requires that you must extend a qualified privilege to the defendant if you believe that the defendant has proved by a preponderance of the evidence that it is a commercial credit reporting agency and that defendant furnished the erroneous report only to its customers who had requested credit information concerning the plaintiff. If you determine that a qualified privilege should be applied in this case by application the foregoing rule, then you may find for the plaintiff and against the defendant in any amount only if you believe that the plaintiff has proved by a preponderance of the evidence that the

defendant exceeded its privilege by acting with malice when it published the erroneous report. If you determine that this qualified privilege should apply, then you must return a verdict for the defendant unless you believe that the facts, as proved, establish malice.

2. The word "malice" has a specific legal meaning in this context. More than mere negligence or want of sound judgment and more than hasty or mistaken action is required to establish malice. In this context, "malice" means the intentional doing of a wrongful act without just cause or excuse. *Nott v. Stoddard*, 38 Vt. 25, 32 (1865), *Hedman v. Siegriest*, 127 Vt. 291, 294 (1968), *Partridge v. Cole*, 96 Vt. 281, 285 (1923), *Judd v. Challoux*, 114 Vt. 1, 4 (1944). Plaintiff has the burden to persuade you by a preponderance of evidence that the defendant's conduct in this case amounted to malice as I have defined it.

3. (Defendant requests the following charge if the Court charges the jury to the effect that actual damages need not be specifically proven in a case of libel *per se*, but not otherwise:)

Although the law presumes damage in some amount in a case of libel *per se*, and therefore relieves the plaintiff of the burden of establishing by specific proof that damages have occurred, [the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have, in fact, occurred.] It is proper, if in your judgment you deem it to be correct, even in a case of libel *per se* for you to return a verdict of only nominal damages, such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the

plaintiff for the damages actually caused by the defendant.

4. Any award of damages which you may make to the plaintiff in this case must be limited to damages suffered by the corporate plaintiff itself and your award may not reflect any damages which you may believe were suffered by anyone other than the plaintiff corporation, including the individuals who may be officers, shareholders, or otherwise connected with the corporate plaintiff.

5. In defamation actions, the law requires that you consider whether the defendant has taken any steps to mitigate any damages which the plaintiff may have sustained.

6. Mitigation of damages is action taken by the defendant to lessen the extent of severity of the injury sustained by the plaintiff because of the defendant's conduct. 50 Am Jur 2d, *Libel and Slander*, § 375.

7. If you find that the defendant took steps such as notifying the persons to whom it published the erroneous report of bankruptcy to the effect that that report was in error, apologized to plaintiff, or otherwise made an effort to lessen the extent or severity of plaintiff's damages, then you must take this mitigating conduct of the defendant into account in determining the amount of damages, and you must lessen your award of damages to the extent that you believe is appropriate in all of the circumstances.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

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DUN & BRADSTREET

**By Its Attorneys
YOUNG & MONTE**

**By _____
Peter J. Monte**

cc: Thomas L. Heilmann, Esq.

APPENDIX C

STATE OF VERMONT) WASHINGTON SUPERIOR COURT
 :SS.
COUNTY OF WASHINGTON) Docket No. S-326-77 WnC

GREENMOSS BUILDERS, INC.)
)
)
)
)
DUN & BRADSTREET, INC.)

**DEFENDANTS MEMORANDUM OF LAW CONCERNING
EXISTENCE AND NATURE OF QUALIFIED PRIVILEGE**

THIS ACTION was brought by Greenmoss Builders, Inc. against Dun & Bradstreet, Inc., for damages from an alleged defamation of the plaintiff by the defendant. The defamation complained of was a report by Dun & Bradstreet, Inc., on or about July 26, 1976, to the effect that the plaintiff was bankrupt and which included an allegedly erroneous statement of the plaintiff's assets and liabilities. Defendant admits that its July 26, 1976, report concerning the plaintiff erroneously attributed bankruptcy to the plaintiff and understated plaintiff's assets and liabilities.

Defendant does not concede, however, that this erroneous publication establishes its liability in this matter. Defendant submits that there is a qualified privilege extended to it as a commercial credit reporting agency and that because defendant has not abused this privilege, it is not liable to plaintiff on the complaint. The purpose of this memorandum is to state the defendant's authority and argument regarding the existence of this privilege and its position that defendant has not in this case exceeded the privilege.

EXISTENCE OF QUALIFIED PRIVILEGE

The Vermont Supreme Court has not been called upon to rule directly on the question of whether or not a qualified privilege is extended in defamation actions such as the one at bar. The overwhelming weight of authority in other jurisdictions, however, extends a qualified privilege in defamation actions to merchantile or credit reporting agencies. In fact, defendant is aware of only two states which deny this qualified privilege. In Georgia, conditional privileges are statutorily defined, *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886); and, in Idaho, the courts have not addressed the question since 1914, *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914).

The qualified privilege which is a part of the common law of most jurisdictions may be stated as follows: A qualified privilege exists which insulates a commercial credit reporting agency from liability for otherwise defamatory statements if the statement is made by the credit reporting agency in confidence and in good faith to its customers which have requested the information and have a legitimate business interest in the information. See e.g., *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, (CA 10 Kan.) 448 F.2d 647, cert. den. 405 U.S. 1026; *Petition of Retailers Commercial Agency, Inc.*, 343 Mass. 515, 174 N.E. 2d 376; *H.E. Crawford Co. v. Dun & Bradstreet, Inc.* 241 F.2d 387 (4th cert. 1957); *Ford Motor Credit Co. v. Holland*, 367 A 2d 1311; *O'Neill v. Dun & Bradstreet, Inc.*, 456 S.W. 2d 96 (1970 Tex); *Roemer v. Retail Credit Co.*, (1970) 3 Cal App 3d, 83 Cal Rptr 540, Restatement (Second) Torts, Scope note preceding § 393 (1977); 40 ALR 3d 1049 at seq.,

30 ALR 2d 770, 776; 15 Am Jur 2d, *Collections and Credit Agencies*, §§ 26, 27.

Although the Vermont Supreme Court has never decided a case which called into issue the specific privilege which is the subject of this memorandum, the Vermont law clearly recognizes the principles and considerations which underlie the cases in other jurisdictions establishing the qualified privilege in question. In *Nott v. Stoddard*, 38 Vt. 25, 32 (1865), a defamation action, the Vermont Supreme Court stated:

[W]hen the words are defamatory, the law infers malice and a question of malice is not submitted to the jury except upon the question of damages, unless the occasion of speaking the words is such as to rebut that inference and render the speaking prima facie excusable; in which case the *plaintiff cannot recover unless there is malice in fact. Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character...* These cases are an exception to the general rule that malice be presumed as a matter of law. (Emphasis added)

Thus has the Vermont Supreme Court recognized the common law rationale which underlies the existence of the qualified privilege. That rationale is that public policy fosters the exchange of necessary information without strict liability for errors made in good faith when there is an important public purpose being served by the disclosure of the information. Vermont specifically recognizes confidential advice for a legitimate purpose in communications to persons who have asked for information and have a right

or interest to know the information as falling within the area protected by this public policy.

The case at bar illustrates the wisdom of this public policy. Our economic system is dependent upon the availability of credit which, in turn, depends upon a lender obtaining information about the borrower so that an informed decision about the prospects of repayment can be made before credit is extended. A lender cannot be left to rely solely on information provided by the borrower and must obtain information from other sources less subject to bias. It is obviously unrealistic to expect that a free flow of essential information would exist if strict liability were imposed on all persons who respond in good faith to a credit inquiry. In order, therefore, to encourage the good faith exchange of information for legitimate purposes, a *qualified* privilege was crafted by the courts at common law. This qualified privilege is not a license because, if abused, the privilege is lost.

There is a second rationale which underlies some court's decisions in favor of the creation of this qualified privilege. This second rationale is that the First and Fourteenth Amendments of the United States Constitution apply to actions for defamation, even those involving non-media defendants. See e.g., *Marchesi v. Franchino*, 387 A.2d 1129 (1978); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 58, 350 A.2d 688 (1976); *Millsaps v. Bankers Life Company*, 35 Ill App. 3d 735, 342 N.E. 2d 329 (1976); Restatement (Second) Torts § 580 B. See also, *The Supreme Court*, 1973 Term, 88 Harv. L. Rev. 41, 148, n. 52 (1974). These authorities conclude that it would violate the provisions of the First and Fourteenth Amendments of the United States

Constitution to impose strict liability for defamation.

These authorities extend the rationale of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) beyond defamatory utterances published by communications media. The rationale of this extension is recited by The Restatement (Second) Torts § 580 B, comment (e), as follows:

As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

....There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant.

For views and substantial accord with this rationale, see *The Supreme Court*, 1973 Term, 88 Har. L. Rev. 41, 148 n. 52 (1974); Anderson, *Libel and Slander, Press Self-Censorship*, 53 Tex. L. Rev. at 442.

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DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

DUN & BRADSTREET, INC.

By Its Attorneys
YOUNG & MONTE

By _____
Peter J. Monte

By _____
Brian R. Lyford

No. 83-18

DEC 22 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

- I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?
- II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?
- III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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OPINIONS BELOW

The order and opinion of the Supreme Court of the State of Vermont is not yet officially reported. It is reported unofficially at 461 A. 2d 414 (1983), reprinted in the Joint Appendix at 31-46.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Joint Appendix at 25-27.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976). The order and opinion to be reviewed was dated and entered by the Supreme Court of Vermont on April 15, 1983. On July 8, 1983, and within the time specified under 28 U.S.C. § 2101(c) (1976), Petitioner filed its petition for a writ of certiorari. By order of November 7, 1983, this Court granted the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. amend. XIV, § 1, cl. 2:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B"),¹ Petitioner herein, a publisher of financial reports.² The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of \$50,000.00 compensatory damages and \$300,000.00 punitive damages.

1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice (J.A. 13) to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.³ None of the five subscribers was a customer of Greenmoss.

¹ Dun & Bradstreet, Inc. is a wholly owned subsidiary of The Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of The Dun & Bradstreet Corporation are Donnelly & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of The Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Service Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

² D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

³ If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president, John Flanagan, contacted D&B's regional office in Manchester, New Hampshire, and advised D&B that the Special Notice was in error. On that same day, D&B issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. D&B sent the Correction Notice to each of the five subscribers who had received the original Special Notice.

2. The Proceedings Below

The complaint⁴ alleged that D&B erroneously reported that Greenmoss had filed a voluntary petition in bankruptcy and that the Special Notice "grossly misrepresented the assets and liabilities of the corporation" Greenmoss claimed that it had suffered damages, humiliation, injury and loss to its business reputation and standing in the community. Its complaint demanded \$7,500.00 in compensatory damages and \$15,000.00 in punitive damages. (J.A. 5-7)

At trial, Greenmoss introduced the deposition testimony of Julie Mullen, the employee of D&B who customarily reviewed bankruptcy petitions in Vermont.

Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

⁴ The complaint was originally filed on behalf of Greenmoss and its president, Mr. Flanagan. Plaintiffs made identical allegations and sought identical damages. By order dated January 23, 1980, the trial court granted D&B's motion to dismiss Mr. Flanagan as a party plaintiff. (J.A. 1)

(Tr. 287-326)* Ms. Mullen's apparent misreading of the Greenmoss employee's petition had caused the erroneous Special Notice to be issued. There is *no evidence* in Ms. Mullen's testimony or in any other part of the record that D&B published the Special Notice with reckless disregard for the truth or with actual knowledge of falsity. Her good faith was never questioned.

Greenmoss did not offer testimony from any of the five subscribers or from any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages and injury was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case. Mr. Flanagan conceded that the company's most profitable year was the year that followed D&B's erroneous report. (Tr. 143) Nevertheless, he speculated that although the company's sales and profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of \$2,000 - \$5,000 in contacting individuals to refute the erroneous information. (Tr. 174) Even so, there was no evidence establishing a causal connection between the publication of the Special Notice to the five subscribers, none of whom were customers of Greenmoss, and the company's alleged injury and damages.

Greenmoss contended that the Special Notice had prompted one of the subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that

* "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

when he received the Special Notice he did not believe it. He confirmed that day with Mr. Flanagan that Greenmoss was "still alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that he was the only bank officer who saw the Special Notice, that he favored making the pending loan to Greenmoss, but that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.* (Tr. 212-13, 215-16, 253-54)

* The bank's representative testified as follows concerning the two senior officers' refusal to make the loan to Greenmoss:

The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There was some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building.

* * *

Q. Is it fair then to say, Wayne, that the reason that the loan was declined is that the Howard Bank ultimately decided that it was in jeopardy of [not] being repaid should the line of credit be extended?

A. That was the decision, yes.

(Tr. 253-54)

There is no record support for the statement of the Vermont Supreme Court that "the bank put off any future consideration of credit to plaintiff until the discrepancy was cleared up." (J.A. 34-35)

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous *per se*. This means that the *Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.*

(J.A. 17) (emphasis added). Later the Court added:

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; *where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel *per se*, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as

you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 19) (emphasis added). Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." Instead, it defined "malice" as follows:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously

(J.A. 18-19) (emphasis added). That instruction allowed the jury to award punitive damages without convincing proof of knowledge of falsity or reckless disregard for the truth.

D&B timely objected to the court's instructions on libel *per se* and punitive damages.

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of \$350,000.00, consisting of \$50,000.00 compensatory damages and \$300,000.00 punitive damages. (J.A. 2) The \$50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only \$31,000 in lost profits (\$50,000 "projected" profits less \$19,000 profits actually

earned), plus expenses not in excess of \$5,000. (Tr. 97-99) Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

After the verdict, D&B filed a timely motion for a new trial. (J.A. 2) D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case. The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that

damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

(J.A. 25-27) (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified questions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards announced in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

[W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

....
 "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation"

461 A.2d at 418, 419 (J.A. 40, 42) (citations omitted). As a result, the Vermont Supreme Court held that the trial court erred in granting a new trial and that the trial court should have entered judgment on the verdict.

SUMMARY OF ARGUMENT

The Vermont Supreme Court improperly held that limitations on presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply only to the "media." In its opinion, the court ignored this Court's holding in *Gertz* that, absent actual malice, the state interest in compensating private defamation plaintiffs extends no further than compensation for actual injury.

The Constitution protects all defamation defendants against presumed and punitive damages in the absence of actual malice. Neither the language nor the history of the First Amendment suggests that any group should have more freedom of speech or of the press than others. This Court has been historically reluctant to give any class of speakers special First Amendment rights. Giving the "media" a preferred constitutional status would tend to undermine, rather than to support, the values embodied in the First Amendment.

Furthermore, the Vermont Supreme Court's "media"/"non-media" distinction is unsound and unworkable. In practice, the judiciary's efforts to divide defendants into "media" and "non-media" classes would

lead to *ad hoc*, inconsistent results in all but the most obvious cases. In their search for an analytical framework for the problem, the lower courts would likely focus on the nature of the speech concerned. That, in turn, would resurrect the "public interest" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Adopting a "media"/"non-media" dichotomy would contradict *Gertz*, which was prompted by dissatisfaction with the *Rosenbloom* approach.

No legitimate state interest justifies a rule that limits the liability of newspapers, magazines, and broadcasters, while subjecting other speakers to greater exposure. Because the lower court authorized presumed and punitive damages where no actual malice existed, and because the rules announced in *Gertz* should apply to all defamation defendants, the judgment of the Vermont Supreme Court should be reversed, and a new trial should be ordered.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ABSENT A SHOWING OF ACTUAL MALICE.

I.

The Vermont Supreme Court Wrongly Refused To Apply First Amendment Limitations On Defamation Damages Recognized In *Gertz v. Robert Welch, Inc.*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court sought to define "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Id.* at 325. *Gertz* involved a libel action against the publisher of a magazine article which had described the plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Holding that the plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court had erred in applying the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that the states were free to define their own standards of liability in cases involving defamation of private individuals "so long as they do not impose liability without fault" 418 U.S. at 347.

In *Sullivan*, the Court had focused on the public or private status of the plaintiff to determine applicability of the actual malice liability standard. In *Gertz*, the Court returned to that analytical framework, rejecting the *ad hoc*, content-based approach of the plurality in

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). 418 U.S. at 343-44. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest' " or of "'what information is relevant to self-government.'" *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). The Court was also concerned that adherence to *Rosenbloom*

would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; *see id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

Although in *Gertz* it refused to require private plaintiffs to meet the *Sullivan* actual malice standard for liability, the Court declined to reinstate a jury award based on presumed damages. Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court reasoned:

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is

necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*

Id. at 349 (emphasis added). Accordingly, state remedies for defamation were held subject to First Amendment limitations on presumed and punitive damages. *Id.* at 350.

The Court recognized that recovery of presumed damages under the common law of defamation is an "oddy of tort law":

Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. *More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

Id. at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages in defamation actions. Like presumed damages, punitive damages—in reality civil fines—were irrelevant to the state interest in compensation for actual injury and threatened the same uncontrolled jury discretion.⁷ *Id.* The Court therefore held:

In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350. Because the jury in *Gertz* “was allowed to impose liability without fault and was permitted to presume damages without proof of injury,” the Court ordered a new trial. *Id.* at 352.

In this case, the trial court ordered a new trial for the same reason. It found that its charge authorized presumed and punitive damages absent knowledge of falsity or reckless disregard for the truth, and failed to comport with *Gertz*. The Vermont Supreme Court dis-

⁷ As Justice Harlan wrote in *Rosenbloom*:

At a minimum, even in the purely private libel area, . . . the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, e.g., 3 L. Frumer, et al., *Personal Injury* § 2.02 (1965); H. Oleck, *Damages to Persons and Property* § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

agreed with the trial court's decision to grant a new trial. Drawing a distinction between "media" and "non-media" defamation, the Vermont Supreme Court determined that *Gertz* applied only to "media" defendants.

The Vermont Supreme Court ignored *Gertz*'s unequivocal pronouncement that, absent actual malice, "the States have *no substantial interest* in securing for [private] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The decision on review assumes that the States have a legitimate interest in overcompensating victims of "non-media" defamation, even where the defendant acted without actual malice. This Court's clear holding to the contrary in *Gertz* makes that assumption untenable. For that reason alone, the lower court's decision should be reversed, and D&B should be granted a new trial.

II.

The Vermont Supreme Court's "Media"/"Non-Media" Distinction Is Unsound And Unworkable.

A. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.

Neither the language nor the history of the First Amendment supports the view that "media" expression should be exalted above other speech. *See generally* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77 (1975). Nor is there anything in the First Amendment to suggest that what the communications industry has to say is more worthy of constitutional protection than the words of merchants,

scientists, or machinists. The lower court's decision, however, would accord special treatment to an undefined class of "media" speakers. Other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed.

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)); accord *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[T]he basic principles of freedom of speech and the press . . . do not vary.").

The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin*, *supra*, 303 U.S. at 451-452, 58 S.Ct. at 668-669. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fer-

vor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

"Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705, 92 S.Ct. 2646, 2668, 33 L.Ed.2d 626 (1972), quoting *Lovell v. Griffin, supra*, 303 U.S., at 450, 452, 58 S.Ct., at 668, 669.

Bellotti, 435 U.S. at 801-02 (Burger, C.J. concurring).

The holdings in *Sullivan* and *Gertz* were not expressly limited to the "media."⁸ *Sullivan* applied the

⁸ In *Sullivan*, the Court's opinion began by declaring that, "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." 376 U.S. at 256 (emphasis added). In *Gertz*, the Court spoke of its struggle "to define the proper accommodation between the law of defama-

same actual malice test not only to *The New York Times*, but also to the persons whose names had appeared in the advertisement at issue. *Sullivan*, 376 U.S. at 286. *Accord St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*Sullivan* test for liability applied to a private individual's statements).

More important, the justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker. The need to avoid punishing the free flow of information exists regardless of the medium through which the information flows. The First Amendment safeguards individual freedom of expression, not the promotion of specialized groups of communicators. As Chief Justice Burger wrote in his concurring opinion in *Bellotti*:

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

tion and the freedoms of speech and press protected by the First Amendment." 418 U.S. at 325 (emphasis added). Later in the *Gertz* opinion, the Court restated its concern "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." 418 U.S. at 342 (emphasis added) (citations omitted.)

press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . . ' than the liberty of every citizen of the Republic."

435 U.S. at 801-02 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)). See also Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L. J. 149, 167 (1983) ("The Supreme Court has consistently viewed the different first amendment freedoms as merely different aspects of the same guaranty—the right of free expression."); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885 (1982) ("Creating a mediaocracy contradicts the principle of equal liberty of expression: in a free society, everyone should have an opportunity to present her ideas in the marketplace."); Lewis, *A Preferred Position For Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.")*

* Anthony Lewis has also noted:

Blackstone, recording the successful outcome of the long English struggle against press censorship, wrote: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. . . ." Every freeman, that is, not just those organized or institutionalized as "the press." Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate

B. Affirming The Lower Court's Decision Would Lead To *Ad Hoc*, Inconsistent Rulings Dependent Upon Undesirable Assessments Of Particular Speakers' Messages.

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of First Amendment limitations on presumed and punitive damages would now require a threshold ruling as to the *defendant's* status, the judiciary will be forced to determine who is and who is not a member of the "media." That determination will add further complexity to an already overly complex tort.¹⁰

view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values, and we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."

Lewis, *supra* p. 20, at 625-26 (footnotes omitted).

Professor Lange has other, no less compelling, fears:

[I]ndividual interests in speech may be even more seriously threatened by separate constitutional status. With no distinct institutional identification—and now without claim to immediate theoretical alliance with the press—they may find it more difficult to stand up against the constraints which a mass society inevitably finds it convenient to impose.

Lange, *supra* p. 16, at 113 (footnote omitted).

¹⁰ The "media"/"non-media" issue would doubtless require factual development, prompting further discovery, forcing additional briefs, and, in general, making cases of this sort even more expensive—in time, money, and resources—than they already are.

In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. Courts grappling with the issue would be forced to answer a variety of questions. For example, would the size of the speaker's audience be determinative? If the speaker's audience were small, could the stature of the audience entitle the speaker to greater constitutional protection than that available to speakers addressing less influential groups? What should a court do with an individual who earns a livelihood by making speeches to select groups of leading academics or business executives? Would a columnist in a trade or professional journal be more entitled to the appellation "media" than such a speaker? How should the courts treat the person who blurts out a defamatory quip on a television talk show? Would occasional contributors to newspapers be regarded as "media" when repeating their own published statements in a private letter to a friend? Faced with such questions, courts would inevitably reach conflicting decisions.¹¹ The probable result

¹¹ As the Court observed in *Branzburg v. Hayes*, 408 U.S. 665 (1972):

The administration of a constitutional newsmen's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

would be the very uncertainty and unpredictability the Court had hoped to dispel when it decided *Gertz*.¹²

In their search for the decisive factor, the lower courts would likely find themselves deciding the "media" issue by asking whether particular speakers' messages could be expected to have general interest or mass appeal. The dangers of that approach are obvious. Focusing on general interest or appeal permits unjust discrimination according to the decision-maker's values. Unpopular speech could be given less protection, not because it is less important, but only because it is less popular.

The Court has acknowledged the First Amendment's hostility to content-based regulation. See *Police Department v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *United States Postal Service v. Counsel of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be "content-neutral"); see generally Note, *supra* p. 20, at 1880-82 (anti-content-regulation principle is "implicit in the Court's first amendment cases"), and cases cited. Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting) ("[I]f the rough and tumble of debate is the best vehicle for producing approximations of fac-

¹² "[I]t is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority that eliminates the uneasiness engendered by *Rosenbloom's* diversity." 418 U.S. at 354 (Blackmun, J., concurring).

tual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements' merits.").

It was the Court's dissatisfaction with content regulation that led it to abandon the short-lived *Rosenbloom* "public interest" test. *Gertz*, 418 U.S. at 346 (discussed at pp. 12-13, *supra*). See also *Sullivan*, 376 U.S. at 271 ("The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'") (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)) *Time, Inc. v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); Shiffrin, *Defamatory Non-media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 926 (1978) ("Gertz plainly states that communications which are deemed to have nothing to do with self-government and which do not relate to public issues fall within the ambit of first amendment protection. . . .").

The Vermont Supreme Court's "media"/"non-media" distinction is nothing more than content regulation couched in terms of interest balancing. See Note, *supra* p. 20, at 1885-86 ("[P]rotecting speakers based on their media status is a device for protecting political messages; it is content regulation by another name."). Citing language reminiscent of the *Rosenbloom* plurality, the Vermont Supreme Court regarded D&B's Special Notice unworthy of protection because it involved

"no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability

causing a reaction of self-censorship by the press."

(J.A. 39) (citation omitted). That language signals a return to the concepts the Court found inadequate in *Gertz*.¹³

The lower court regarded "political speech" as the First Amendment's sole concern. But the Constitution protects far more than that:

It is no doubt true that a central purpose of the First Amendment "'was to protect the free discussion of governmental affairs.'" *Post*, at 1811, quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, and *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484. But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Aboud v. Detroit Board of Education, 431 U.S. 209, 231 (1977); see also *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

¹³ Prior to *Gertz*, some courts had applied *Rosenbloom's* now discarded "public interest test" to deny First Amendment protection to financial reports. See *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), cert. denied, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz*.

as appropriate to enable the members of society to cope with the exigencies of their period.”)

As one commentator has aptly stated:

[A]llocating protection on the basis of political content is repugnant to the very purpose of the first amendment, for such allocation will follow majoritarian impulses. The “political” label can be not only stretched to protect popular messages, but also shrunk to chill unpopular messages. Majorities, however, do not need a constitutional amendment to protect their speech; they can secure statutory protection by pressuring their popularly elected legislators. It is minorities who need a structural provision to shield their messages, regardless of who is in power. No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the first amendment ensures that everyone—majorities and minorities—can help to generate the ideas “members of society [need] to cope with the exigencies of their period.”

Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . .”

Note, *supra* p. 20, at 1881, 1894 (footnotes omitted).

Even if the First Amendment permitted the type of judicial favoritism to “public” or “political” speech the

Vermont Supreme Court would give it, distinguishing between "media" and "non-media" defendants does not serve that purpose. There is no reason to believe that a message broadcast by a "media" voice promotes public or political goals any better than the message of a "non-media" speaker. To the contrary:

Public issues can be debated with as much force among individuals as in the press. . . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

Lange, supra p. 16, at 116-17 (footnote omitted). *Accord Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) ("Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case."); Restatement (Second) of Torts § 580A comment h (1976). "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

C. First Amendment Limitations On Presumed And Punitive Damages Should Apply Uniformly To All Speakers.

The Court's analysis in *Gertz* permits no distinction between the "media" and everyone else:

[T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause *less* harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1418 (1975) (emphasis added) (footnote omitted). Accord Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The Communicative Torts and The First Amendment*, 48 Miss. L. J. 671, 699-700 (1977).

The rationale behind the constitutional defamation privileges is based on the premise that the fear of a potential defamation lawsuit will inhibit first amendment activity. The rationale is applicable to all forms of speech.

Comment, *supra* p. 20, at 184. Accord Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 Tulsa L. J. 601, 625 (1977) ("A constitutional privilege is applied across the board and not nibbled away.")

A "media"/"non-media" distinction would promote injustice. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.¹⁴ Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.¹⁵ Or, as in this case, the same information published by D&B would be judged differently if published in a local newspaper.

The Court should, therefore, take this opportunity to make explicit what *Gertz* already implicitly commands:

The "ultimate expansion of *Gertz* to provide equal standards of recovery against both media and non-media defendants seems predictable" if, in fact, one can call it an "expansion" at all. The well-established theory of our Constitution appears to be that "every citizen may speak his mind and every newspaper express its view." The

¹⁴ See Comment, *supra* p. 20, at 171 ("It is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

¹⁵ Under common law notions of libel, an individual finding himself in that predicament very likely would be unable to recover contribution from either the "media" defendant or the original publisher, since contribution lies only among joint tortfeasors, while the common law regards each defamatory publication as a separate tort. See *Howe v. Bradstreet Co.*, 135 Ga. 564, 565, 69 S.E. 1082, 1083 (1911) ("If the original publisher does not participate in a republication of the libel by another, he is not liable in a joint action with the second publisher.")

case law clearly supports the view that the constitutional privilege is as available to the non-media defendant as to the media defendant.

Yasser, *supra* p. 29, at 624 (footnote omitted).

The result Petitioner seeks is the natural consequence of existing doctrine:

[T]he goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them. This is scarcely to suggest a new theory; there are as many examples of how this might be done as there have been cases referring to "freedom of expression" or turning on "freedom of speech and press." If anything "new" is needed, it is probably a clearer understanding of the risks which may be incurred when the reference point is something less than these concepts.

Lange, *supra* p. 16, at 118.

Commentators have implored the Court to remove all doubts that *Gertz* applies to everyone:

[T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.

...
The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it.

...
[One] . . . reason to believe the Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's

gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.

The only way to accomodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.

Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 58, 63, 64, 66 (1976) (emphasis added) (footnote omitted). Accord Collins & Drushal, *supra* p. 28, at 333-34; Yasser, *supra* p. 29, at 623-26; Comment, *supra* p. 20, at 169; 52 Wash. L. Rev. 915, 935 (1978).

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court achieved that accomodation by focusing on the status of the plaintiff, not the speaker or the message. The Court should not depart from that approach and embark again upon the ill-fated and analytically unacceptable course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its logical conclusion. The only way to reach a just result is to apply the same constitutional limitations on damages to every defamation defendant.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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CLERK

NO. 83-18

In The
Supreme Court of the United States

October Term, 1983

— 0 —
DUN & BRADSTREET, INC.,

Petitioner,

vs.

GREENMOSS BUILDERS, INC.,

Respondent.

— 0 —
On Writ of Certiorari to the
Supreme Court of the State of Vermont

— 0 —
BRIEF OF RESPONDENT

— 0 —
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QUESTION PRESENTED FOR REVIEW

Respondent, Greenmoss Builders, Inc., believes that the question presented for review is:

I. Whether a state regulatory system that vigorously protects the target of false and misleading commercial speech from false factual statements made about its financial condition is constitutionally appropriate under *Gertz v. Robert Welch, Inc.*

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NO. 83-18

In The
Supreme Court of the United States
October Term, 1983

DUN & BRADSTREET, INC.,
Petitioner,
vs.
GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

1. The Facts

Respondent, Greenmoss Builders, Inc., (hereinafter Greenmoss)¹ is a moderately sized building contractor in

¹Greenmoss Builders, Inc., is a Vermont corporation with no parent companies, subsidiaries or affiliates.

central Vermont. Reputation is important to Greenmoss since the overwhelming portion of its business has come from referrals.

Prior to Greenmoss' involvement with Dun & Bradstreet (hereinafter D & B), it never experienced economic difficulties and its business was on a steady upward climb. (Tr. 27-29)²

Greenmoss learned about the false report of its bankruptcy, circulated by D & B on July 26, 1976, in a most startling fashion. Greenmoss' president was at a local bank to discuss an additional line of credit for a new development. Greenmoss and the bank had a very favorable business relationship prior to D & B's publication of the bankruptcy report. (Tr. 40-44). As Greenmoss' President discussed the loan request, the bank officer handed him a D & B "Special Notice" declaring that Greenmoss had filed a voluntary bankruptcy petition. This was a false statement of fact. The report also grossly understated Greenmoss' assets and liabilities. The bank suspended action on the loan request until the matter of Greenmoss' status could be cleared up. (Tr. 54). The Bank was a subscriber to D & B's credit reporting service.

There then commenced a series of contacts between Greenmoss and D & B which prompted Greenmoss' claim at trial that D & B engaged in persistent, oppressive and outrageous conduct. After locating the D & B regional office responsible for the publication, Greenmoss' President spoke with a D & B representative who was not willing to accept Greenmoss' denial of the bankruptcy report

²"Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

and continually refused to divulge who had received the falsehoods. (Tr. 57-60). Greenmoss was repeatedly frustrated in its efforts to obtain this information. It was not until litigation ensued and formal discovery requests were submitted that the scope of the circulation of the false bankruptcy report was revealed. Thus, Greenmoss found itself in the untenable position of knowing that false notices of its bankruptcy had been circulated but was unable to obtain information about the breadth of the defamation.

The next series of communications Greenmoss had with D & B were equally unsatisfactory. About eight days after the bankruptcy notice, Greenmoss received a call from D & B advising that it had "confirmed" the falsity of the bankruptcy report and a so-called corrective notice was read.³

Greenmoss was most upset about the language of the so-called corrective notice, believing it to be almost as damaging as the bankruptcy notice. Greenmoss complained that the notice was inadequate and misleading in numerous respects and requested that it not be sent in that form. Notwithstanding Greenmoss' objections, the notice was sent in the form chosen by D & B. The so-called corrective notice stated in part that Greenmoss continued operations "as previously reported" which Greenmoss felt was very misleading in view of the gross inaccuracies in the assets

³In its statement of the case, D & B asserts that it was not until August 3, 1976 that Greenmoss' President contacted D & B to advise it that the bankruptcy notice was in error and on the same date D & B issued a retraction. This does not square with the testimony in the case which was that Greenmoss called D & B in late July, 1976 and was told that D & B would "look into it". (Tr. 42-43, 54-55, 57-58, 65-68).

and liabilities reported in the false bankruptcy notice and the lack of a clear reference to what previous reports D & B was referring to. The bankruptcy notice had changed Greenmoss' rating to one that signified it had discontinued operations.

D & B did not retain fidelity to its own "corrective notice" since reports subsequent thereto changed Greenmoss' rating to a "blank rating" which meant that circumstances existed at *Greenmoss* that were difficult to classify under the D & B system (Tr. 382). The evidence was that circumstances had not changed at Greenmoss prior to these reports and that D & B had done no investigation prior to their publication. Prior to the bankruptcy notice, Greenmoss' D & B ratings had steadily improved.

D & B had established rules and procedures for verifying the truth of its information prior to publication which its own witnesses admitted were totally and completely ignored in Greenmoss' case. Moreover, D & B had data on Greenmoss prior to its decision to publish the bankruptcy report which served as notice that there was a high probability of falsity in the bankruptcy report made by D & B's Vermont correspondent.

Prior to the Greenmoss/D & B difficulties, the Clerk of the U.S. District Court in Burlington, Vermont, had been employed by D & B as its bankruptcy correspondent. (Tr. 261-267). The Clerk became concerned about a potential conflict of interest, informed D & B that he was resigning and suggested his own replacement; a sixteen-year-old high school junior whom the Clerk knew because she had mowed his lawn and done maintenance work around the house. (Tr. 268). She had never had an office job before and knew nothing about bankruptcy.

Without being interviewed by anyone at D & B, this youngster was hired at \$200 per year to replace the Clerk. D & B had no knowledge whether the Clerk instructed her about the job, what that training was, if any, and never made inquiry about her performance. There were never any job duties which emanated from D & B concerning her responsibilities. The evidence revealed numerous discrepancies between the bankruptcy petition the correspondent erroneously reviewed and the report she filed with D & B.

After the unsatisfactory dialogue with D & B concerning the corrective notice, Greenmoss, knowing that D & B personnel periodically called seeking information, instructed its employees and office personnel not to discuss the condition of the company with any D & B representatives. In subsequent reports, D & B circulated information that the Secretary (capital S) of Greenmoss "deferred financial information." In fact, this person was Greenmoss' receptionist who knew nothing about the company's condition and had been told not to discuss such matters. D & B persisted in such conduct. For example, Greenmoss requested a caveat in any D & B reports pointing out that, because of the defamation, Greenmoss had decided not to disclose its present financial condition to D & B. (Tr. 197). D & B refused to insert such curative language and in the next report following this request, cryptically reported "the secretary/treasurer of Greenmoss declined financial information". (Tr. 495-96). All of the information concerning D & B's change in Greenmoss' rating and its alleged deferrals and declinations to provide information were circulated to D & B's subscribers who requested information of Greenmoss.

Although D & B excerpts, out of context, segments of testimony on the quantum of compensatory damages, this issue is not before the Court. Beyond that, the trial Court, both after the trial and after the decision of the Vermont Supreme Court from which this Petition is taken, denied D & B's motions for judgment *NOV*. In addition, the Vermont Supreme Court upheld the Trial Court's post-trial rulings on the damage issue, ruling that D & B failed to preserve by appropriate motions at trial all questions based on the evidentiary support for the verdict.⁴ Third, D & B, post trial, expressed no desire for relief based on remittitur.

Although the factual sufficiency for the claim that the bankruptcy notice affected Greenmoss' relationship with its bank is not before this Court, the evidence was that the bankruptcy notice came from D & B directly to the main branch of the Bank, that the loan officers who ultimately rejected Greenmoss' loan request (and, in addition, suggested that Greenmoss find another bank to do business with) were officers at the main branch whom D & B chose not to call as witnesses and the loan officer at the local branch could not say whether or not the loan officers who actually made the decision on Greenmoss' future banking relationship had seen the bankruptcy report. Greenmoss vigorously challenged the credibility of the local branch

⁴In footnote 6 of D & B's Brief, it is asserted that "there is no record support for the statement of the Vermont Supreme Court that 'the bank put off any future consideration of credit to Plaintiff until the discrepancy was cleared up.' (J.A. 34-35)". Contrary to D & B's representation, Greenmoss' President testified twice that bank officials told him they would "not be going any further until this (the bankruptcy notice) was straightened out" (Tr. 54).

loan officer. The bank's decision to terminate not only the request for additional credit but also all banking relationships with Greenmoss, after having done business since 1973, came approximately two months after the publication of the bankruptcy notice. Additionally, Greenmoss introduced evidence that the bank it subsequently was able to establish a relationship with had no knowledge of D & B's reports.

2. The Proceedings Below

D & B's answer and affirmative defenses to Greenmoss' suit together with its pre-verdict memoranda bear close scrutiny since they reveal the theory upon which the case was presented to the trial court and the opportunities which D & B gave the trial court to frame the jury instructions to which it now claims entitlement. No constitutional parameters were asserted before trial. D & B's prime defense was that the defamatory statements were entitled to a common law commercial credit reporting privilege. This was an issue without precedent in Vermont.

Prior to the verdict, D & B never asserted the First and Fourteenth Amendments to the U.S. Constitution nor the extension of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as an *independent or separate* basis for protection nor did it claim entitlement to *both Gertz* and the common law privilege. To persuade the trial judge to formulate jury instructions in accordance with a common law defamation privilege, D & B contended that the issue it now asserts as its only avenue to avoid the verdict was a "second rationale" which it said "underlies some court's decisions in favor of the creation of this qualified privilege." (D & B's Memorandum of Law Concerning Existence and

Nature of Qualified Privilege, Appendix C4-5, Greenmoss' Opposition to Petition for Writ of Certiorari.) (Emphasis added) It characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege. D & B's Requests to Charge the Jury were utilized by the Trial Court in large measure. Curiously, the portion of the charge D & B highlights as objectionable is derived verbatim from its own jury requests. Compare J.A. 19 with Defendant's Request to Charge Jury paragraph 3.

Because of the nature of this case, the manner in which it was presented to the trial Court and the Vermont Supreme Court's construction of the charge as a whole, the charge in its totality must be considered. Greenmoss would point out, however, that the punitive damage instructions were not solely confined to a punitive damage award arising out of the mere fact of defamatory publication. (J.A. 20). The charge on punitive damages allowed the jury to consider, wholly apart from considerations of defamation, the conduct of D & B toward Greenmoss after the publication with a view toward whether D & B's actions justified the deterrence of exemplary damages. (J.A. 21).

D & B objected to the Court's instruction on compensatory damages to the extent that those instructions related to libel *per se*, apparently believing that the common law privilege was conclusively established factually. Significantly, and contrary to the implication in D & B's Brief at page 7, D & B did *not* raise objections to the Court's instruction on punitive damages on grounds related to the issues here. Rather, apparently content with the legal standard which the Court planned to instruct, D & B contended the facts did not meet the test and moved

to dismiss the punitive claim solely on grounds of factual inadequacy. (Tr. 468-69). D & B objected to that portion of the punitive damage instruction that permitted the jury to consider D & B's conduct both before and after the publication of the erroneous report in deciding whether it acted with actual malice so as to support an award of punitive damages. (Tr. 493-494). Although the issue of the common law qualified privilege is not before this Court, the manner in which the trial Court handled the question is important to a proper understanding of the position of D & B here. The trial Court repeatedly instructed the jury that the qualified privilege was an obstacle which Greenmoss would have to hurdle in order to hold D & B liable and to justify the award of any damages. Reading the charge as a whole, it was only after the jury determined that the qualified privilege was abused by malicious or reckless publication, that the question of *any* damages, compensatory or punitive, could be considered. Thus, the use of libel *per se* language in the charge is surplusage.⁵

The Vermont Supreme Court, in construing the charge, ruled that, although *Gertz* was not applicable, D & B was afforded a charge which satisfied the constitutional privilege outlined in *Gertz*. As the Vermont Supreme Court ruled, "in short, D & B has nothing to complain about, since it received [a] beneficial charge[s] to which it was not entitled." (J.A. 46).

⁵The libel *per se* language was in the charge to cover the possibility that the jury would find that D & B did not establish it was a credit reporting agency and thus did not carry its burden of proof on the application of the common law privilege.

SUMMARY OF ARGUMENT

A. In attempting to extend *Gertz v. Robert Welch, Inc.* to non-media defendants in order to protect its credit reports, D & B misframes the issue. This case should be looked at as a commercial speech case. The issue is whether false and misleading statements of fact made by a commercial speaker in the course of its business should receive constitutional protection despite a state regulatory system that protects the target of such speech from false factual statements concerning the condition of its business. There is no difference between regulation of speech based on statute or administrative rule and regulation based on case precedent.

The speech involved here fits the classic mold of commercial speech. The speech is false and misleading and thus, can be severely restricted and even prohibited without running afoul of the First Amendment. The state did not prohibit the speech in this case and the restrictions placed upon it were not by way of prior restraint but rather focused on the subsequent financial responsibility of the speaker to the injured party. This is an appropriate position for a state to take in response to false commercial speech that damages its citizens. *Gertz* and *New York Times v. Sullivan* are inapplicable to such situations and should not be extended to cover them since to do so would depreciate and devitalize the First Amendment and the interests it protects particularly in defamation cases. If *Gertz* applies to this case, commercial speech will receive the full constitutional protection previously reserved for speech necessary about public issues and public debate. This speaker does not need the

breathing space allowed for false facts because there is no concomitant utilization of the type of speech which justifies giving leeway to falsehood. This speech has nothing to do with the political goals of the First Amendment nor of the criticism of government. It is not germane to arriving at a self-governing society. If *Gertz* applies, all lines between what is and what is not within the ambit of the First Amendment will be erased and commercial speech will ascend to the same status as *New York Times* speech. This Court's careful development of First Amendment doctrine in the area of commercial speech will be frustrated.

B. Even if D & B has focused on the right issue and the extension of *Gertz* in the non-media context should be discussed, D & B has used the wrong analysis to advance that proposition. *Gertz* itself does not apply to non-media defendants in language, holding, rationale or concept. Thus, the Court must extend *Gertz* to cover non-media defendants like D & B. There is no reason to do that and it would be bad policy. Non-media defendants are already constitutionally protected to the level of *New York Times* standards if they are sued for defamation by public officials or public figures. Thus, the only defamation area left open by the case progression from *New York Times* through *Gertz* is purely private defamation, i.e., suits by purely private plaintiffs against non-media defendants. The considerations which prompted this Court in bringing the First Amendment into defamation law should be carefully focused upon to see if they are relevant to purely private defamation. When so considered, the total lack of genuine First Amendment issues becomes evident where a defendant like D & B is involved.

If *Gertz* is extended to non-media defendants, the First Amendment standards mandated by *New York Times* will apply in every defamation case tried in this country. This headlong rush to symmetry will be the death knell of reputational interests of our citizenry, even in states like Vermont which constitutionally protect reputation. Because of the fabric of common law in most states, extension of *Gertz* to non-media defendants will give commercial credit rating agencies more protection than any speaker, including the press, with no corresponding increase in protecting the issues for which the Framers drafted the First Amendment. The present formula constitutionally protects enough speech that fosters First Amendment ideals. Extending *Gertz* to all non-media defendants will protect too much speech that has nothing to do with the First Amendment and provide protection to very little that does.

C. The absence of any involvement or implication of the press renders this private defamation case without relevant precedent in First Amendment methodology. D & B's exclusive reliance on the speech clause in the First Amendment is not enough to broaden *Gertz* beyond its holding since the press involvement was an indispensable component of the *Gertz* formula. If the Speech Clause protects the type of speech in this case, the Press Clause will be a redundant, functionless appendage. This is contrary to the intent of the Framers.

D. This case builds a constitutional mountain out of an argument advanced at trial as a secondary "make weight" to persuade the trial judge to apply a common law privilege to credit reporting agencies. D & B never gave the lower court the chance to independently consider

Gertz since it did not assert the First Amendment as an independent basis for protection. Thus, a case tried as a common law libel case is now sought to be the vehicle for one of the major constitutional issues of our jurisprudence. The issue raised by the Petition was not preserved and presented in a manner commensurate with a litigant's advocacy responsibility and is thus foreclosed.

ARGUMENT

I. DUN & BRADSTREET IS NOT ENTITLED TO THE FIRST AMENDMENT PROTECTIONS ESTABLISHED IN GERTZ V. ROBERT WELCH, INC.

A. The Statements Made By Dun & Bradstreet In This Case Which Gave Rise To Its Liability For Damages Are Erroneous And Misleading Statements Of Fact Made In Connection With A Commercial Transaction And Are Therefore Not Entitled To Constitutional Protection.

Greenmoss submits that the issue framed by the Petition is inadequate. Resolution of this case need not involve the extension of *Gertz* to a non-media defendant, even a non-media defendant like D & B. Similarly, the boundaries of any media/non-media distinction and the appropriateness of such a distinction need not be explored here. This case can be more properly decided by reference to constitutional standards involving commercial speech and commercial speakers. What makes this case particularly unsuited for discussion of the issue

framed by the Petition is the fact that D & B is not representative of the class of non-media speakers and, indeed, is a peculiar advocate to advance the cause of constitutional interests of non-media speakers. *The proper issue here is whether admittedly false and misleading commercial speech should receive constitutional protection against money damages awarded pursuant to a state regulatory scheme which stringently protects businesses from false and deceptive statements of fact about the condition of their business.* Greenmoss contends that the Constitution should not invade this area and, as to this Petitioner, traditional common law protections are entirely appropriate and adequate. The defamation here constituted trade libel under traditional notions since on its face it directly affected Greenmoss' business.

It must be precisely recognized the types of statements for which D & B attempts to obtain First Amendment protection. It is conceded by D & B that the defamatory statements it made about Greenmoss in reporting the bankruptcy were false and inaccurate statements of fact. They had no panache of opinion nor did they invite debate. What is before the Court are simply false and misleading statements of fact, made in a commercial milieu, which D & B admits were negligently and carelessly made. It is speech exclusively in the economic interest of the speaker (D & B) and its audience (D & B's private, paid-in-advance subscribers).

The reports in this case constitute commercial speech. They involve and are about business. The audience is not one of general demography. It is a limited, finite, selective, business audience that makes contracts in advance to obtain, on pre-arranged terms and conditions, reports to

assist it in evaluating commercial transactions. Indeed, this is the nature of the commercial transaction proposed by D & B. The information gathered does not relate to opinion nor does the audience expect that it will contain opinion. The reports are not, strictly speaking, in the economic interest of the speaker. The speech D & B seeks to protect does not even propose a commercial transaction. The speech here is the culmination or product of a previous proposal of a commercial transaction, a proposal which D & B's audience accepted because it needed veracity about a given subject. The speaker gets paid directly and *exclusively* by the audience to provide facts that are easy to verify. This remuneration is based on creating a large, elaborate system for collecting and verifying these facts. D & B is, as it contended at trial, the largest credit reporting agency in the world (Tr. 373). Because this speaker is in the marketplace of facts and not ideas, and in part because it has the opportunity to make contracts in advance with its audience, it is not faced with any dilemma of publishing or remaining silent and it can spread costs of doing business among its many subscribers.

The fact that Vermont has chosen to regulate this speaker by case precedent rather than by statute or regulation and regulates the speaker by financial responsibility rather than prior restraint is constitutionally irrelevant.

Gertz recognizes that there is "no Constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. A false fact, carelessly and negligently made, is not an "essential part of any exposition of ideas and [is] of such slight social value as a step to the truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality." 418 U.S. at 340. See also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976) (untruthful speech has never been protected for its own sake.) *Id.* at 772, n. 24.

In the instant case, totally unlike *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, including *Gertz*, a commercial speaker seeks the protections which have heretofore been recognized by this Court solely in the context of media or press defamation or in actions involving public officials or public figures.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), validated a state regulatory system which fostered truthfulness where commercial speech was involved. The Court evidenced minimal concern that regulation to assure truthfulness in commercial speakers would discourage such speech and focused on the commercial speaker's knowledge of his product and his business interest in its dissemination. 433 U.S. at 383. Citing *Gertz*, the Court declared "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Id.*

Bates rejects the interest in spontaneity of commercial speech on reasoning particularly appropriate to the instant case. Commercial speech is generally "calculated" and thus "strict requirements for truthfulness" are appropriate. *Id.* at 383. Here, the product D & B sells is accurate data about the business of others. Its subscribers would have it no other way. They do not want to be stimulated by ideas and opinions from D & B. A spontaneous comment in such a report, if factually incorrect or mis-

leading, could have untoward economic consequences for them. D & B's audience is not interested in D & B's freedom of expression or in its political statements. The audience wants veracity and D & B has responded to this need by building a broad based information gathering network which is oriented to the collection of facts.

Commercial speech occupies a lower place in the First Amendment hierarchy than non-commercial expression. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). *Ohralik* posits that the constitutional distinction between commercial expression and non-commercial expression rests on the idea that commercial expression is of less constitutional moment than other forms of speech. *Ohralik* retreated from even the limited protection of commercial speech granted in *Bates* and held that entire classes of commercial speech *necessarily including some harmless speech* could be prohibited where allowing the speech would be likely to result in some deception. 436 U.S. at 464-67. Justice Powell, writing for the Court, observed that the protections of *New York Times v. Sullivan* might not be needed for commercial speech, specifically comparing *New York Times* with *Dun & Bradstreet v. Grove*, 438 F.2d 433 (3rd Cir.) *cert. denied*, 404 U.S. 898 (1971). The objectivity, hardiness, ease of verification and the speaker's knowledge of the product or service about which the speech is made all militated against the *Ohralik* Court's tolerance of false commercial speech merely to protect some speech that may have tangential First Amendment significance.

Dun & Bradstreet v. Grove, *supra*, holds that a private subscription credit report is "not a medium entitled

to the extended constitutional protection of the *New York Times* doctrine." Like *Grove*, most of the lower courts which have focused on the commercial nature of credit reports have analyzed those reports as a genre of commercial speech lying beyond the protection of the First Amendment. *Oberman v. Dun & Bradstreet*, 460 F. 2d 1381 (7th Cir. 1972); *Kansas Electric Supply Company v. Dun & Bradstreet*, 448 F. 2d 647 (10th Cir. 1971), *cert. denied* 405 U.S. 1026 (1972); *Millstone v. O'Hanlon Reports, Inc.*, 528 F. 2d 829 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 482 F. 2d 25 (5th Cir. 1973), *cert. denied* 415 U.S. 985 (1974); *Wortham v. Dun & Bradstreet, Inc.*, 399 F. Supp. 633 (S.D. Tex. 1975) *aff'd.*, 537 F. 2d 1143 (5th Cir. 1976).⁶ Professor Maurer concludes that the analysis used in these decisions parallels the contemporary pronouncements of this Court on the constitutional status of commercial speech. See Maurer, *Common Law Defamation and The Fair Credit Reporting Act*, 72 Georgetown L.J. 109 (1983).

Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980), announced a balancing test for commercial speech to determine whether such speech, despite its depreciated constitutional status, is, nonetheless, entitled to some First Amendment protection. Whether protection is available for a particular commercial expression turns on the nature of the expression and the government interest served by its regulation. This test was further explained in *Metromedia, Inc. v.*

⁶It should be noted that many of the cases cited herein rely, in part, upon the now rejected public interest analysis utilized in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

City of San Diego, 453 U.S. 490 (1981). The court explained *Central Hudson* as having

adopted a four part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) the First Amendment protects commercial speech *only* if that speech concerns lawful activity *and is not misleading*. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective.

453 U.S. at 507 (citations omitted) (emphasis added).

In applying those rules to this case, Greenmoss submits that one need go no further than the first step of the analysis. *Central Hudson* and *Metromedia* posit that if commercial speech is to receive any protection under the First Amendment, the speech must not be misleading. The bankruptcy notice published by D & B in this case, far worse than being misleading, was totally and completely false, not merely as to the fact of the bankruptcy, but also as to the level of Greenmoss' assets and liabilities. D & B's further commercial statements in this case, undertaken after the false report of bankruptcy, are an unattractive combination of both false and misleading statements.

Consequently, the speech sought to be protected here does not satisfy the threshold test to obtain even the minimal degree of protection provided to commercial speech by the First Amendment. Therefore, the state of Vermont, by its case precedent, had the power to stringently regulate and even exclude such speech. The state, of course, did neither since the trial Court made the com-

mon law privilege an obstacle to recovery of any damages whatsoever. Even assuming, for the purpose of argument, that the jury instructions permitted *per se* damages without any showing of fault,⁷ which Greenmoss vigorously contests, and further assuming that such an instruction can be said to exclude speech, the *Central Hudson* test permits such treatment of this speech. Of course, Vermont did not exclude or restrain D & B's speech in advance, but rather, required that D & B be financially responsible for the reputational damage to Greenmoss.

One need not advance to the remaining three criteria of *Central Hudson* if the speech sought to be regulated is misleading. Under *Central Hudson*, if the speech misleads, it can be *severely* regulated or prohibited entirely. However, application of those criteria to this case reveals interesting dimensions.

The government interest in protecting its citizens' reputations⁸ rights is a substantial interest, as this Court recognized in *Gertz*. Such considerations apply with even greater force here since reputation has constitutional protection and recognition in Vermont. The Vermont Constitution provides that:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for *all injuries or wrongs which he may receive in his person, property, or character . . .* Vermont Constitution, Chapter 1, Article 4th. (Emphasis added.)

That the framers of the Vermont Constitution believed personal reputation to be of such importance to insert it

⁷As Greenmoss points out in this brief, libel *per se*, as used in the jury charge, gave Greenmoss nothing and did not prejudice D & B.

in the Vermont Constitution is definitive evidence of the substantial nature of the governmental interest in the protection of reputations in Vermont.

The assessment of compensatory and punitive damages under the instructions given by the trial court directly enhance the governmental interest in protecting reputation and guarding its citizens against persistent, insulting, oppressive conduct in that there is a deterrent effect, long recognized in the Vermont cases, in assessing punitive damages. It is quite significant that the jury instructions permitted consideration of D & B's conduct both before and after the publication of the erroneous report. This gave the jury the opportunity to gauge the nature of D & B's actions *independently* of the mere fact of a single defamatory publication. In other words, Vermont and other states have a strong interest in deterring repeated, harassing and persistent conduct taken against their citizens. The trial Court's instructions, which permitted the jury to assess the propriety of that conduct and the consequences for engaging in it, directly advanced the state's interest in deterrence totally apart from issues of publication of defamation which is the only issue triggering First Amendment concerns here.

The instructions on mitigation of damages focused upon the jury's discretion whether to award any punitive damages at all and if so, the amount of the award. The mitigation instructions, which were quite extensive, allowed punitive damages to reach no farther than necessary to accomplish the state's objectives. *cf. Central Hudson, supra*. Moreover, the mitigation instructions placed two limitations on any allegedly unlimited discretion given to juries in the punitive damage area. The first was that

any action undertaken by D & B to mitigate Greenmoss' damages was to be considered by the jury on the threshold question of whether or not to award any damages of a punitive nature. The second limiting instruction was that if the jury found that D & B attempted to mitigate damages, any punitive damage award must be accordingly lessened.

In view of the foregoing, the test for granting commercial speech any First Amendment protection advanced in *Central Hudson* is not satisfied. Thus, D & B's commercial speech should not receive any First Amendment protection.

Additionally, contrary to the apparent assumption made by D & B, the jury instructions on punitive damages embraced and encompassed common law notions of exemplary damages for actions of D & B which were extrinsic from and unrelated to the publication of the defamation. Those instructions were not limited solely to consideration of D & B's publication of a defamatory statement but brought into play other conduct of D & B violative of Greenmoss' rights.

Even if credit reports fall within the realm of protected commercial speech, it does not necessarily follow that credit reporting agencies will be afforded the full protection of *Gertz* and *New York Times* because commercial speech, under settled doctrines, is accorded less protection than other constitutionally guaranteed speech. See Maurer, *supra*, at 110.

As Professor Shiffrin, a noted commentator on the First Amendment points out, "prohibitions of false or misleading speech are always permitted." See Shiffrin,

The First Amendment and Economic Regulations: Away From a General Theory of the First Amendment, 73 Northwestern L. J., Volume 5, at Page — (1984).⁸ (Hereinafter Shiffrin, *The First Amendment*).

Gertz instructs that erroneous statements of fact receive protection only because they are inevitable in the context of *free debate* to protect the type of speech which is important to First Amendment liberties. False factual reports about a business filing for bankruptcy do not invite free debate. D & B's audience would be radically diminished if it were advised that D & B needed "breathing space" to commit error to satisfy its own self-expression. D & B wants breathing space to obtain financial protection against errors, not so that it can contribute to robust debate on First Amendment issues. Thus, as will be discussed *infra*, there are no protected First Amendment interests which this Court has acknowledged in the area of defamation that can be advanced to support a claim that the Constitution should protect these concededly false facts. The defamation in this case had nothing to do with public issues, political self-government, ideas, self-expression, discovery of truth or exposition of opinion. Note, *Constitutional Protection of Commercial Speech*, 82 Columbia L. Rev. 720, 731 (1982). These reports relate to assets, liabilities, bank accounts, identification of officers and principals and other easily verifiable facts. They do not propose a commercial transaction in themselves. They

⁸Professor Shiffrin's comprehensive comments on commercial speech were presented at a symposium at Northwestern University Law School. The presentation is to be published in the forthcoming volume (No. 5) of the Northwestern University Law Journal. When published, Greenmoss will provide appropriate page citations.

are not, strictly speaking, statements in the economic interest of the speaker, although the speaker does derive economic profit from their circulation.

In *Ohralik*, the Court worried that "the failure to distinguish between commercial and non-commercial speech could invite dilution of non-commercial speech simply by a leveling process of the force of the First Amendment protections with respect to non-commercial speech." 436 U.S. at 456. Mr. Justice Rehnquist, dissenting in *Bates*, observed that invoking the First Amendment to protect advertising of goods and services, however truthful or reasonable, would "demean" the First Amendment. The speech clause was intended as a "sanctuary for expressions of public importance or intellectual interest." 433 U.S. at 404. Because *D & B* does not frame the issue in this case correctly, it fails to perceive that extending *Gertz* to this type of commercial speech will effect precisely such a degradation of the First Amendment.

A ruling that the *Gertz* protections do not apply to commercial credit reporting agencies will not send the nation's trial Courts off on an *ad hoc* journey into often abstract line drawing. Thus, the mischief for which this Court in *Gertz* criticized the decision in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), will not occur. In *Gertz*, the Court was concerned that the *Rosenbloom* "general or public interest" test and its "information relevant to self-government" tests would force judges into deciding on an *ad hoc* basis which publications qualify for First Amendment Protections and which do not. See 418 U.S. at 346. As Professor Shiffrin cogently points out, "drawing lines based on underlying First Amendment values is a far cry from sending out the judiciary on a general *ad hoc*

expedition to separate matters of general or public interests from matters that are not. A commitment to segregate certain commercial speech from *Gertz* protection is not a commitment to general *ad hoc* determinations. The costs of uncertainty in the line drawing process are outweighed by respect for state interests and unnecessary trivialization of First Amendment concerns." Shiffrin, *First Amendment*, *supra*, at —. The line to be drawn here is simple and straightforward. If it is not drawn to exclude this Petitioner, the absolutist's view of the First Amendment will finally prevail and over-the-fence gossip, no matter how injurious to a private individual's reputation, will be within the coverage of the First Amendment. The failure to draw lines would totally upset the balancing approach which this Court is committed to in weighing the competing interests at stake between an individual's reputational rights, particularly when they are recognized in the state constitution, and First Amendment protections.

One final aspect of analyzing this case in terms of commercial speech is that the state's power to regulate the type of commercial conduct that it deems permissible can be analyzed in terms of the cost of doing business in that particular state. *The extension of Gertz suggested by D & B would, of course, eradicate all state's common laws of libel per se, for all plaintiffs against all defendants.* In those states, like Vermont, which choose not to extend protection to erroneous commercial statements of fact, the cost of doing business for a company like D & B may or may not be higher than in states which protect such business. The evidence is, of course, inconclusive. However, it was never the purpose of the First Amendment

to allow businesses to operate in all states at the same cost. Vermont should remain free to decide for itself whether or not, consistent with the tests announced in *Central Hudson Gas & Electric* and *Metromedia v. City of San Diego*, this form of commercial speech should be protected.

For the above reasons, Greenmoss submits that this case should be analyzed on a commercial speech basis and, when so analyzed, the protections in *Gertz* should not be extended to commercial credit reporting businesses.

B. Gertz v. Robert Welch, Inc. Should Not Be Extended To Protect This Non-Media Petitioner.

Although D & B repeatedly seeks to create the impression that the Vermont Supreme Court ignored the holdings in *Gertz* and, acting on its own, drew a distinction between media and non-media defendants, such implication ignores reality. The Vermont Supreme Court is not the progenitor of the distinction between media and non-media defendants. Justice Powell's carefully worded opinion in *Gertz* is patently limited only to cases in which there is a media defendant. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347, Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants*, 95 Harv. L. Rev. 1876, 1877 (1982).

There is no ambiguity in *Gertz*. The decision does not textually or methodologically apply to defamation by a non-media defendant. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1417 (1975); Brosnahan, *From Times v. Sullivan to Gertz v.*

Welch: Ten Years of Balancing Libel Law and The First Amendment, 26 Hastings L.J. 777, 792-793 (1975).

Any doubt that *Gertz's* holding is limited solely to media defendants is dispelled by subsequent observations of this Court. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 113 n.16 (1979). The context of the statements in *Babbitt* and *Hutchinson* about *Gertz's* limits makes it clear that the Court in each case was referring to suits by private plaintiffs against non-media defendants especially since the application of the First Amendment in suits by public officials and public figures against non-media defendants has already been resolved. Thus, D & B's attempt to establish the affirmative out of a negative, i.e., the omission of a specific exclusion of non-media defendants as a ruling that non-media defendants are covered by *Gertz*, fails to appreciate the sophistication of the *Gertz* opinion. The fundamental methodology of *Gertz* adopts a balancing test which recognizes that accommodations must be struck between the interests that states have in protecting *private* individuals from defamation and the values the First Amendment protects when the media is involved in defamation suits as those values have been identified by this Court in *New York Times* and its progeny. Vermont has strong interests in protecting private individuals from defamation. This is not only a settled doctrine in Vermont case law, *Darling v. Clement*, 69 Vt. 292, 37 A. 779 (1897); but, far more significantly, has constitutional recognition. Vermont Constitution, Chapter 1, Article 4th. *Gertz* does not rely upon any state constitutional provision for its acknowledgement that private individuals should be compensated for wrongful injury to reputation, 418 U.S. at 346.

Faced with an *a fortiori* case for vindicating personal reputation, the question for consideration here is what First Amendment values can D & B legitimately identify, *especially in the context of this Court's decided cases on defamation and the First Amendment, that make down-weight against the strong state interest in reputational protection acknowledged in Gertz and enhanced by the Vermont Constitution?* Greenmoss submits that there are no First Amendment values which would justify the extension of *Gertz's* protection to this Petitioner.

In its effort to find some interest protected by the First Amendment, D & B draws on cases which have nothing to do with defamation. Its difficulty in identifying a relevant First Amendment concern highlights the inappropriate framing of the issue raised by the Petition. "Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Metromedia v. City of San Diego*, 453 U.S. 490, 501, n.8 (1981).

After a probing analysis of First Amendment precedent, Professor Shiffrin concludes that the structure of First Amendment doctrine varies depending on the context and issue before the Court. "The assumption of general balancing", posits Professor Shiffrin "is that the values of speech interact with other values in such complicated ways that the Court may need discrete doctrinal tools to resolve particular problems." Shiffrin, *The First Amendment, supra*, at —.

Empty abstractions about the First Amendment, such as those asserted by D & B, have no meaningful role in the utilization of the balancing process. "To make a bal-

ancing approach meaningful, we must think in narrower terms, recognizing that the strengths of the competing interests may vary in new contexts." Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. Rev. 1 (1965), cited in Shiffrin, *Id.* at —.

Accordingly, to properly analyze the issue asserted by Petitioner, it is necessary to identify the doctrinal foundations of the First Amendment, not as vague, elusive concepts and potential panaceas for all ills, but as a source of the real tension created between those foundations and the law of defamation.

New York Times v. Sullivan emanates from a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. 376 U.S. 254, at 270. (emphasis added). In the oft-maligned phrase which has caused so much contradictory scholarship, the Court observed that the "central meaning" of the First Amendment renders prosecutions for libel on government abhorrent to the American system of jurisprudence. *Id.* at 291-92. The rationale of *New York Times* is rooted in a fundamental respect for the right of the people to criticize the government. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 922 (1978). (Hereinafter Shiffrin, *Non-Media Speech*).

D & B surprisingly contends that unless *Gertz* is extended beyond media speakers, other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed. D & B Brief at 17. This contention is incorrect and ignores the fact that the logic of

New York Times compels its application to defamation of public officials and public figures by non-media defendants. See *Eaton, supra*, at 1406. Predictably, the cases have so held. *Henry v. Collins*, 380 U.S. 356 (1965); *St. Amant v. Thompson*, 390 U.S. 356 (1968). Therefore, the liability of non-media speakers is not unlimited; non-media defendants receive the same protections in suits brought against them by public officials and public figures as do media defendants. Thus, the issue in this case is much narrower than D & B would have the Court believe. It is only where a private plaintiff is involved that the *New York Times* protections would not be available to a non-media defendant.

The crucial elements which bring the First Amendment into conflict with defamation law are missing where the plaintiff is not a public official or public figure and there is no media defendant. First, there is no threat to the free and robust debate on public issues. D & B does not contend that its defamatory statements have anything to do with free and robust debate on public issues. Secondly, there is no potential interference with the meaningful dialogue of ideas concerning self-government. Again D & B does not argue that its speech has anything to do with self-government. Third, in defamation law, the threat of liability causing a reaction of self-censorship, at least when the press is involved, causes First Amendment tension. *Gertz*, 418 U.S. at 350. D & B does not contend that it fears self-censorship if *Gertz* protections are not provided. It is certainly not obvious that self-censorship will occur with a huge commercial enterprise such as D & B. Indeed, it has been suggested that self-censorship is not a real threat in the case of a credit reporting agency. *Hood*

v. Dun & Bradstreet, supra; Note, *Libel and Self-Censorship*, 53 Tex. L. Rev. 422, 442-43 n. 96 (1975). Since these reports deal with fact and not opinion, veracity, which is the reason credit reporting businesses prosper, achieves the mutual goals of immunizing against liability and creating the financial security to vigorously respond to contested claims.

From the standpoint of policy, the decision not to extend *Gertz* to non-media defendants should not really be a troublesome matter since in most non-media cases, particularly those which involve credit reporting agencies, common law privileges are usually applicable. In fact, extending *Gertz* to a non-media commercial credit rating agency will have the paradoxical result of providing such a defendant with even more protection than is afforded to the media.⁹

A major difference between media and non-media speakers is that the restrictive nature of the publication by a non-media speaker, even though perhaps broadly disseminated, denies, in large part, any possible means of reply in the medium which caused the defamation. Some access to the defaming medium for reply and rebuttal was assumed to be available to the defamed individual by the Court in *Gertz*. 418 U.S. at 344. Although rebuttal may

⁹For example, compare *Gobin v. Globe Publishing Company*, 216 Kan. 223, 531 P. 2d 76 (Kan. 1975) (negligence required to award any compensatory damages in litigation involving private plaintiff and media defendant) with *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971) cert. denied, 405 U.S. 1026 (1972) (applying Kansas Law) (Plaintiff must prove wanton and reckless conduct to recover any compensatory damages against commercial credit reporting agency).

be inadequate, it is certainly not irrelevant. 418 U.S. 344 at n.9. In this case, the very nature of the credit reporting medium admits of no access for any realistic opportunity to counteract false statements of fact. Indeed, Greenmoss' efforts at access to the D & B medium as a self-help remedy were refused. In addition to lack of access to the non-media speaker's medium to effect the remedy of self-help, the identification of a credit reporting agency as the source of defamatory publications may never be exposed and its proximate causation difficult to pinpoint but the damage is inflicted nonetheless. The *Grove v. Dun & Bradstreet* court referred to these considerations as the "pernicious" effects of non-media defamation. 438 F.2d at 437. Compare this with the immediacy of awareness of publication where media defendants are involved.

If *Gertz* is extended to non-media speech, the result will be to protect much speech having nothing to do with public issues while safeguarding relatively little that does. Consistent with the focus of this Court in First Amendment defamation cases, it is appropriate that some public speech go unprotected lest too much non-public speech be unnecessarily safeguarded. See Shiffrin, *Non-Media Speech*, *supra* at 929-930.

Because defamatory non-media speech has been constitutionalized to the extent that it involves public figures and public persons, there is consistency to the *New York Times/Gertz* formulation that debate on public issues be sufficiently robust and wide open for First Amendment purposes. This construction validates the commitment to a politically based interpretation of the First Amendment

in defamation cases and does not afford unnecessary protection to speech not relevant to public issues. Shiffrin, *Id.* See also, Eaton, *supra* at 1408.¹⁰

D & B's contention that the *Gertz* standard should be extended to it to "avoid punishing the free flow of information" is both inapposite and ironic. The cases cited in support of that proposition simply have nothing to do with the tension between the First Amendment and defamation. The irony is that D & B's publications are very limited access publications which are inimical to providing information on a general basis. Their stated purpose is contrary to both the *New York Times*' rationale of free and uninhibited debate on public issues and the facilitation of the free flow of information since their use is conditioned upon maintaining confidentiality.

D & B also advances the spectre that a failure to extend *Gertz* to non-media defendants will force judges into difficult *ad hoc* rulings. Once again, D & B advances a cause which is not its own. D & B has never contended that it is a media defendant and there is a "common sense distinction" between the commercial speech involved here and other varieties of speech. *Central Hudson Gas & Electric*, 447 U.S. at 562. This attempt at eradicating all line drawing is a subterfuge for asking this Court to abandon the balancing methodology utilized in First Amend-

¹⁰In this context, D & B's reliance upon *Henry v. Collins*, 380 U.S. 356 (1965) is misplaced since the plaintiffs in *Henry v. Collins* were public officials. Additionally, several of the communications which the Court held were entitled to *New York Times* protections in *Collins* were telephone statements to reporters for publication which followed in newspapers. See *Henry v. Collins*, 253 Miss. 34, 42-44, 158 So. 2d 28, 30-31 (1963).

ment defamation cases. The line drawing to be done has boundaries measured by First Amendment/defamation considerations already decided by this Court. Secondly, D & B's suggestion shows minimal confidence in judges, who draw lines *within recognized parameters* every day.

The media/non-media distinction, frets D & B, is a device for protecting political messages and is thus content regulation in disguise. D & B's unstated assumption is that content regulation is always constitutionally prohibited. This is not so. *Young v. American Mini Theaters*, 427 U.S. 50, 66-70 (1976) (the question whether speech is or is not protected by the First Amendment "often" depends on its content). Focusing on content is particularly appropriate with commercial speech. *Bates v. State Bar of Arizona*, *supra* at 463 (commercial speech "must" be distinguished by its content). Moreover, even if some content is regulated by the media/non-media dichotomy, this is appropriate policy in defamation litigation, drawing upon the fundamental predicates of *New York Times* which is based upon protecting political messages and fostering debate on public issues. *New York Times* advances a politically based interpretation of the First Amendment. Shiffrin, *Non-Media Speech*, *supra* at 923-24. *By protecting public figures, public officials and media defendants, the goal of fostering debate on public issues should be sufficiently robust and wide open for First Amendment purposes without extending it to non-media defendants.*

It is not necessary in this case to decide whether *Gertz* should be extended to all non-media defendants. It need only be decided whether non-media defendants such as

D & B should be extended the protections of *Gertz*. Greenmoss submits that *Gertz* should not be extended. Its limitation to the media is intentional, workable and rational and provides a legitimate demarcation point for protecting First Amendment interests. To hold otherwise would unwisely and unnecessarily adjust the balance between the First Amendment and reputational protection.

C. The Rules Fashioned In *Gertz* Should Not Be Extended In This Case Since The Press Or Media Is Not A Party And There Are No Overtones Of Press Involvement.

This Court has never decided a defamation case involving a purely private plaintiff and a non-media defendant who has no connection with the press or in which there are no press overtones. Eaton, *supra*, at 1404 n.228.

The commentary by Mr. Justice Stewart and the opinion in *Gertz* intimate that *New York Times* may be primarily a free press case. Mr. Justice Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975); Shiffrin, *Non-Media Speech*, *supra*, at 916, 923-24. Mr. Justice Stewart concludes that "The Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander. *Id.* at 635. See also, *Monitor Patriot v. Roy*, 401 U.S. 265, 270 (1971) "the role of *New York Times* was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws."

Mr. Justice Stewart stresses that this Court's libel cases are decided in the context of the guarantee of freedom of the press. Freedom of the press is a structural provision of the Constitution and, in contrast to the pro-

tection of other liberties, protects an institution. Stewart, *supra*, at 633-35. When the element of freedom of the press is absent, the private reputational interests of a plaintiff like Greenmoss make downweight against the constitutional interests. Thus, absent the involvement of the press, the *New York Times/Gertz* doctrines should not apply. Stated otherwise, the balancing test utilized in *Gertz* cannot simply be transferred *in toto* to this case since the balance is entirely upset when there is absent from the equation a media defendant or media involvement.

Recently, the Court has focused upon the explicit guarantee of freedom of the press and its importance to the Framers of the Constitution. *Minneapolis Star v. Minnesota Commission of Revenue*, — U.S. —, 103 S.Ct. 1365 (1983). The renewed interest in the importance of the press clause, Justice Stewart's comments and a brilliant historical analysis of the press clause by Professor Anderson prompt a careful examination of whether involvement of the press is a significant Constitutional factor *in the area of defamation*.

"The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." *First National Bank v. Bellotti*, 435 U.S. 765 at 798 (1978) (Burger, J. concurring). Professor Anderson's scholarly work is particularly noteworthy on the question of the primacy of the Press Clause. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983). To the Framers, the Press Clause was primary and the Speech Clause was secondary. *Id.* at 487. Since the press was expected by the Framers to be the primary source of

restraint against government power, and speech was an afterthought as a means of checking government power, the theory of *New York Times* and *Gertz* and the limitation in *Gertz* to media defendants have strong historical foundation.

The historical antecedents of the importance of the press demonstrate that freedom of speech and freedom of the press are not interchangeable, that they are not a constitutional redundancy and most significantly, that removing the press from the equation in First Amendment defamation litigation eviscerates such a significant portion of the *New York Times/Gertz* formula that individual reputational rights assume dominance over the interests of those who do not claim to be members of the press.

II. DUN & BRADSTREET DID NOT PRESERVE AT THE TRIAL COURT LEVEL THE ISSUE PRESENTED BY THIS PETITION AND ITS CONSIDERATION IS THEREFORE FORECLOSED.

Prior to the jury's decision, D & B did not assert *Gertz* as an independent basis for protection. It was solely and exclusively in the context of the common law privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had *any* application to this trial. Significantly, D & B never asserted at the trial Court level that it was entitled to *both* the protection of *Gertz* *and* the protection of the common law privilege; it characterized *Gertz* as setting forth a standard that was equivalent to common law privilege and as a "second rationale" for applying the privilege. Accordingly, this case was presented to the trial court and was tried as a common law libel case

with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense. From all that appeared at trial, there were no overtones of any independent First Amendment protection. Once the trial Court acknowledged that a qualified common law privilege was to be charged, which was an open question in Vermont, D & B was satisfied that it had sufficient protection. D & B gave the trial Court no opportunity to apply *Gertz* as an independent basis for protection. In the objections to the charge, both before and after its delivery, there was no mention of the doctrines advanced in *Gertz*.

Because D & B never put the trial Court on notice that it claimed a separate basis for absolution from liability grounded on the First and Fourteenth Amendments, the issue presented by this Petition is foreclosed.

Litigants have an obligation to adhere to the theories pursued at the trial Court level and theories not pursued there ordinarily will not be entertained on appeal. *Youakim v. Miller*, 425 U.S. 231 (1976). Questions that are not properly raised and preserved during trial proceedings are normally considered waived and parties cannot assign as error trial court's failures to give instructions which were not requested. *Bissett v. Ply-gem*, 533 F. 2d 142 (5th Cir., 1976).

Reference must be had to state law to determine if waiver or failure to preserve exists. *U.S. ex rel. Maxey v. Norris*, 591 F. 2d 386, *cert. denied*, 444 U.S. 912 (1978). Under Vermont law, where constitutional issues are raised on appeal that are not raised below and there appears to be no glaring error, they are foreclosed from consideration. *State v. Prue*, 138 Vt. 331, 415 A. 2d 234 (1980);

State v. Patnaude, 140 Vt. 361, 430 A. 2d 402 (1981). The constitutional issue asserted here does not rise to the level of the "glaring error test" which forgives a party from its advocacy responsibility. *State v. Stockwell*, 142 Vt. 232, 453 A. 2d 1120 (1982); *State v. Towne*, 142 Vt. 241, 453 A. 2d 1133 (1982). The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. *Scanlin v. Hopkins*, 128 Vt. 626, 270 A. 2d 352 (1970); *Dodge v. McArthur*, 126 Vt. 81, 223 A. 2d 453 (1966).

Since D & B never requested instructions for compensatory and punitive damages based on *Gertz*, it is too late in the day to contend for such protection. This omission is particularly crucial on the punitive damage issue. Support for the proposition that the *Gertz* doctrines were not an independent defense asserted by D & B at trial is that it never offered the trial court any suggestion whatsoever as to how to formulate jury instructions based on both the *Gertz* standards and the common law privilege. This would have been, of course, a formidable task.

III. THE CLAIMS MADE BY DUN & BRADSTREET ARE INCONSISTENT WITH THE TRIAL COURT'S INSTRUCTIONS ON DAMAGES

Implicit in D & B's arguments are the claims that liability for actual or compensatory damage was imposed without fault and that punitive damages were assessed solely and exclusively because of the publication of the defamatory report of Greenmoss' bankruptcy. Both of these assumptions are erroneous.

Any fair reading of the charge demonstrates that it clearly and specifically negated any opportunity of Greenmoss to receive damages out of any presumption under the defamation *per se* doctrines. The references to libel *per se* acknowledge that the jury had some liberty, however slight, to decide that D & B was not a commercial credit rating agency. D & B has never claimed the jury did not make such a conclusion nor could it. Ironically, the aspect of the charge that D & B seems to take the strongest exception to is taken verbatim from D & B's third Request to Charge the Jury.

Instructions must be interpreted and construed as a whole. *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). Construing this charge as a whole and specifically considering the findings of the jury, liability was not assessed without fault and the trial court's commentary on the doctrines of libel *per se* had no operative effect.

To the extent that D & B contends it was assessed damages without proof of fault, the standards that Greenmoss had to prove to obtain a compensatory damage verdict were far more restrictive than that assumed to be required by *Gertz*.

On the issue of punitive damages, D & B makes the erroneous assumption that the jury's punitive damage award was issued because it published a defamatory statement. The trial Court's instructions were not so limited, nor was the evidence. The Vermont Supreme Court concluded that "there was ample evidence in the record to enable the jury to conclude that Defendant's conduct was insulting, reckless, and in total disregard of the Plaintiff's rights." (J.A. 45). The Court made no mention of

just the defamation and directed its attention to the cavalier attitude of D & B in its treatment of Greenmoss after the bankruptcy notice. (J.A. 34-36).

In short, D & B apparently would have this Court rule that once *Gertz* applies to a defamation case, other conduct of a defendant *totally apart from its publication* is immunized from traditional common law punitive damage considerations. Stated otherwise, D & B attempts to erect a shield against reckless, oppressive, harassing and outrageous acts merely because at some point in its relationship with Greenmoss, it engaged in publication. Such a contention is well beyond any theory recognized by this Court in First Amendment defamation litigation.

The trial Court's instructions were not limited to the publication of the false report of bankruptcy and this case does not simply involve the publication of a defamatory statement. It involves a defendant who, in addition to defaming, persistently and oppressively treated the Plaintiff well after the defamation. This conduct falls within the realm of traditional common law protection, not within the scope of the *New York Times/Gertz* philosophy.¹¹

The Vermont Supreme Court concluded that the constitutional privilege outlined in *Gertz* was afforded to D & B. This ruling constitutes a legal interpretation by the state's highest court on the impact and legal effect of the instructions when taken as a whole. Therefore, the initial consideration in this case does not involve a

¹¹D & B does not contend that all punitive damage awards are constitutionally proscribed.

constitutional question but, rather, whether the Vermont Supreme Court correctly concluded as a matter of fact and state law that the trial Court's charge included the *Gertz* requirements. To reach the questions urged by D & B, this Court must first resolve against the Vermont Supreme Court and in favor of D & B, a factual question and a mixed question of fact and law as to the appropriateness of that Court's interpretation concerning a jury charge delivered by one of its trial courts. *Smith v. Wade*, — U.S. —, 103 S. Ct. 1625 (1983), elucidates the point that jury instructions need not be compartmentalized on the question of punitive damages when the same standard for awarding punitive damages is an operative component of or is encompassed in the standards necessary for obtaining compensatory damages.

In this case, since negligence abundantly exists and is admitted by D & B, "fault", required by *Gertz* as a precondition to the recovery of actual damages, is present. The high standard Greenmoss had to meet merely to obtain compensatory damages incorporates and encompasses the *Gertz* standard mandated for punitive damages. D & B fails to demonstrate how the application of *Gertz* to this case would benefit it. Accordingly, the result of the Vermont Supreme Court should be affirmed irrespective of this Court's decision on the extension of *Gertz*.

CONCLUSION

Based upon the foregoing, Respondent, Greenmoss Builders, Inc., respectfully urges the Court to affirm the judgment of the Vermont Supreme Court.

Respectfully submitted,

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No. 83-18

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

Petitioner,

v.

GREENMOSS BUILDERS, INC.

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Vermont

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AND
SUPPLEMENTAL BRIEF
OF RESPONDENT, GREENMOSS BUILDERS,
INC.

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**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AND
SUPPLEMENTAL BRIEF OF
RESPONDENT, GREENMOSS BUILDERS, INC.**

Respondent, Greenmoss Builders, Inc, hereby moves for leave to submit a Supplemental Brief consisting of four pages addressing two issues in the case and in support thereof represents as follows:

1. In drafting its initial brief, Greenmoss was guided by advice, assistance and instructions from its printer that a page of typewritten material would be approximately equivalent to a page of offset printing.

2. In attempting to abide by the Court's 50-page limitation for briefs set forth in Rule 34.3, Greenmoss

excised from the draft of its initial brief the facts and authorities contained in this Supplemental Brief due to space restraints.

3. Greenmoss' initial Brief submitted to the Court comprises forty-three pages in length.

4. The four additional pages of brief set forth in this Supplemental Brief will assist the Court in the factual exposition of the case and explains the calculation and computation of the jury's verdict on compensatory damages. Additionally, the Supplemental Brief provides additional support, drawn from cases already cited in Greenmoss' Brief, for the position that credit reporting agencies have no fear of self-censorship if the constitutional protections outlined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) are not extended to them.

5. Dun & Bradstreet has filed no reply brief. Further, the within brief is submitted sufficiently in advance of argument so as to avoid prejudice to D & B.

6. The additional material in the Supplemental Brief will increase Greenmoss' Brief to 46 pages. Greenmoss would have incorporated the arguments made in the Supplemental Brief in its initial Brief but for the general guidelines provided by its printer as to the correlation between the typewritten page and the conversion to offset printing.

7. On March 1, 1984, Greenmoss forwarded to Dun & Bradstreet typewritten copies of the within Motion and Supplemental Brief in order to provide D & B with additional advance time to review the points addressed herein.

WHEREFORE, Greenmoss moves that the within Motion be granted and that the Supplemental Brief be accepted and considered by the Court in addition to Greenmoss' initial Brief.

Respectfully submitted,

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SUPPLEMENTAL STATEMENT OF THE CASE

1. The Facts.

D & B's suggestion that the \$50,000 compensatory damage award derives from the notion of presumed damages is belied by the evidence on damages and the trial Court's charge on compensatory damages.

The charge on compensatory damages instructed the jury to consider items of lost profit and Greenmoss' expenditures caused by D & B's wrongdoing (J. A. 19). D & B claims that such items only total \$36,000 instead of the \$50,000 awarded by the jury. This claim fails to consider that the charge also provided the jury the right to award interest on the damages found from the time of injury, July 26, 1976, to the date of the verdict, April 10, 1980. (Tr. 491). Interest could be awarded at the Vermont statutory rates of 8½ percent per annum until July 1, 1979 and then at 12 percent per annum from July 1, 1979 to the date of verdict. (Tr. 491). Even under D & B's calculation of the actual damages at \$36,000, consideration and calculation of interest, when added to the damage figure asserted by D & B yields a total compensatory damage figure, as of the date of the verdict, of approximately \$50,022.30. This is virtually the amount awarded by the jury for compensatory damages.

Secondly, D & B's analysis of the components of the compensatory award is limited to consideration of lost profits for only a one-year period. Greenmoss introduced evidence that the lost profits in the succeeding year was an additional \$42,000. (Tr. 99, 104).

Thirdly, the compensatory damage instructions cautioned the jury that a verdict of substantial damages was not compelled unless Greenmoss proved "that substantial damages *have in fact* occurred." (J.A. 19 empha-

sis added). The next sentence of the charge re-emphasized that compensation to Greenmoss must be related to the damages *actually* caused by D & B. (J.A. 19 emphasis added).

Finally, the trial court expressly limited consideration of compensatory damages to only lost profits and such expenditures as were made by Greenmoss for self help corrections of the falsehood. (Tr. 488). Accordingly, more abstract actual damage elements such as humiliation and impairment of standing in the community comprise no part of the jury's compensatory damage award here. *Cf. Gertz supra*, at 350. In this case, any presumed compensatory damages were limited to a nominal amount "such as one dollar". (Tr. 488). D & B does not claim the \$50,000 compensatory damage award is nominal.

ARGUMENT

To supplement the arguments made in Section I-B of its initial Brief at pages 30 and 31, Greenmoss submits the following.

Hood v. Dun & Bradstreet, Inc., 482 F. 2d. 25 (5th Cir. 1973) *cert. denied*, 415 U.S. 95 (1974) holds that commercial credit reporting agencies should not be afforded First Amendment protection in defamation cases. In addition to relying upon the commercial speech doctrine, the court in *Hood* doubted that such companies would be inhibited by self-censorship if First Amendment protections were withheld. Because the common law privilege extended to credit reporting agencies is predicated upon the theory that, absent such privilege, such companies would be driven out of business by the cost of defamation suits, the court analyzed the status of credit reporting agencies in jurisdictions that have declined to apply the common law protection.

In Georgia, where credit reporting agencies have no common law privilege, such businesses exist and are thriving. Indeed, the *Hood* court noted that D & B does business in Georgia despite the lack of the privilege and one of the largest credit reporting agencies in the country, Retail Credit Company, is based in Georgia.

The court also referred to a study comparing the activities of credit reporting agencies in Idaho, where no common law privilege exists, with credit agencies in the state of Washington, where the privilege does exist. 482 F. 2d. at 32, n. 18.

The conclusions in that study that no real difference in credit agencies' activities could be perceived in the two states and other factors led the *Hood* court to the conclusion that in those states where there is no conditional privilege, credit information is readily available and there is apparently no inhibition from publishing such reports due to lack of the protection of the privilege.

In short, fears of self-censorship should not be a reason for extending *Gertz* to such defendants especially where there is no evidence whatsoever on this record to suggest

that these unique entities will refrain from publishing their reports about private persons who are not public officials or public figures out of fear of defamation suits. cf. *Gertz, supra.* at 390; (White, J., Dissenting).

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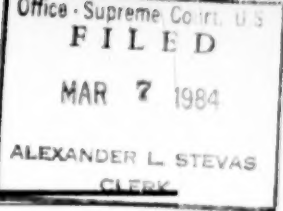
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<i>Sunward Corp. v. Dun & Bradstreet, Inc.</i> , No. 82-K-147 (D.Colo. filed January 27, 1982)	3
<i>Thornhill v. State of Alabama</i> , 310 U.S. 88 (1940)	11
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ARGUMENT

The issue before the Court is whether the First Amendment limits awards of presumed and punitive damages against "non-media" defendants in actions for defamation. D&B has urged the Court to confirm that the First Amendment protects all speakers against awards of presumed and punitive damages, absent proof of actual malice. By doing so, the Court would hardly sound the "death knell of reputational interests of our citizenry." (Respondent's Brief at 12) The limited holding sought here would not do away with the law of libel, nor would it prevent private defamation plaintiffs from recovering damages for actual injury. Despite Greenmoss' obfuscation, D&B seeks only the same result required in defamation cases brought against newspaper publishers, magazine distributors, and television broadcasters.

What D&B urges is not a sweeping change in First Amendment doctrine. A ruling in favor of D&B would, instead, flow naturally from the Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court recognized that absent proof of knowing falsity or reckless disregard for the truth, the states' interest in awarding damages for defamation extends no farther than compensation for actual injury.

Unable to explain why the states' interest is somehow more extensive here than it was in *Gertz*, Greenmoss has tried to obscure the issue by suggesting an expanded view of "commercial speech" and by otherwise contending that the First Amendment does not apply to reports of bankruptcy and other financial matters. In the process, Greenmoss makes little mention of its \$350,000 verdict, no doubt recognizing that

a verdict of that size is insupportable under the circumstances of this case.

As demonstrated below, Greenmoss' arguments against First Amendment limitations on presumed and punitive damages are unacceptable. Rather than importing the unsettled doctrine of "commercial speech" into the law of defamation, and rather than making a constitutional distinction between the press and other members of the public, the Court should confirm that the Constitution's limitations on presumed and punitive damages apply in the same fashion to all speakers. The judgment of the Vermont Supreme Court should therefore be reversed.

I.

NO STATE INTEREST JUSTIFIES THE AWARD OF PRESUMED AND PUNITIVE DAMAGES AGAINST A "NON-MEDIA" DEFENDANT ABSENT ACTUAL MALICE.

A. The Award of Presumed Damages in This Case Has Not Been Justified and Cannot Be Supported.

In this case, Greenmoss sued D&B for \$7,500 actual damages and \$15,000 punitive damages following a false report of bankruptcy.¹ (J.A. 5-7) After a two-day trial, the jury returned a \$350,000 verdict for Greenmoss, many times the company's net worth. That

¹ Following the report of bankruptcy, D&B promptly issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself.

award resulted from instructions that gave the jury uncontrolled discretion to assess unlimited amounts of damages without regard to actual injury, without regard to D&B's perception of the truth at the time of its report, and without regard to the fact that D&B had issued a prompt retraction.

Given these facts, Greenmoss makes no mention of presumed damages in its brief, preferring instead to speak vaguely of "the damage issue" and "compensatory damages." (Respondent's Brief at 6) Faced with the Court's holding in *Gertz* that the states have no substantial interest in authorizing presumed damages for defamation in the absence of actual malice, Greenmoss does not even try to make a case for presumed damages. Nor does Greenmoss suggest that there is anything unique about itself that makes presumed damages constitutionally permissible here when the First Amendment requires proof of actual malice elsewhere.³

On the other hand, Sunward Corporation ("Sunward"), which has filed an *amicus curiae* brief in support of Greenmoss and which has its own exorbitant presumed damages verdict to protect, extols the virtues of presumed damages as a means of "achieving" the states' interest in protecting private reputation.⁴

³ Greenmoss cites the states' general interest in protecting private reputations with no attempt to relate that to the presumed damages component of its verdict. That, of course, is the very interest *Gertz* rejected as a basis for awards of presumed damages.

⁴ The \$3,847,488 verdict for the plaintiff in *Sunward Corp. v. Dun & Bradstreet, Inc.*, No. 82-K-147 (D. Colo. filed January 27, 1982) is a good example of the kind of unmerited windfall—of staggering proportions—that can result from allowing a defamation case to go to a jury without an instruction that presumed

Yet Sunward wholly fails to explain why the states' interest in compensating plaintiffs should be greater in a case of defamation than in a case of negligent misrep-

damages may be awarded only upon a finding of knowing falsity or reckless disregard for the truth (with "reckless disregard" defined as "serious doubt as to the truth" as per *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Sunward's libel claim was based on a D&B report that underestimated Sunward's annual sales and the number of its employees by a substantial percentage. Sunward made no effort to prove any causal connection between the D&B report and a subsequent decline in sales, which the evidence, apparently disregarded by the jury, showed was caused by mismanagement and a decline in the agricultural economy which Sunward served. Instead, Sunward put on the stand its own personnel who testified about rumors of unknown origin that Sunward was in financial difficulty. Sunward's counsel attributed the sales decline to those rumors.

Sunward had available to it through discovery the names of over one hundred recipients of the allegedly defamatory report. (Plaintiffs' trial exhibits 46, 47, 48, 49A and 49B) Sunward's own records contained the names of its 240 salesmen, 1300 dealers, 26 bankers, nearly 100 suppliers and numerous customers—the persons whom, it was argued, might have acted adversely to Sunward as a result of the report or the rumors. Nevertheless, Sunward called not one report recipient, not one salesman, not one dealer, not one banker, not one supplier, and not one customer to testify that the report or any rumor adversely affected their relationship with Sunward.

Instead, Sunward merely introduced evidence of its decline in sales and, like Greenmoss, "projections" of profits it thought it should have made, and relied completely on the doctrine of presumed damages to support its damage claim. The quality of the testimony of the Sunward officers and employees who testified about the rumors and denied that the sales decline had anything to do with the decline in the agricultural market was such that the trial judge, at the hearing on the post-trial motions, commented on the record that had the case been tried to the Court, he would have found for the defendant "because of issues of credibility in the case. . . ." (*Sunward Post Trial Motions, Transcript at 46-47*)

resentation, interference with contract, or fraud, which may involve far more substantial injuries than the damage suggested here. The conduct involved in fraud is far more reprehensible than negligent defamation. Yet Vermont limits recovery for fraud to injury in fact and further requires competent proof of damages.⁴ It seems unlikely that Vermont would have any significant interest in permitting presumed damages for negligent defamation, where the defendant's conduct is less culpable.

Sunward contends that presumed damages are needed in defamation cases because defamation plaintiffs may find it difficult to show that a defamatory statement caused a particular loss. Presumed damages are said to be defamation's counterpart to the negligence doctrine of *res ipsa loquitur*. That analogy, however, does not fit. *Res ipsa loquitur* concerns fault, not damage. A negligence plaintiff who relied on the doctrine of *res ipsa loquitur* would still have to prove injury in fact, a requirement that neither Sunward nor Greenmoss have had to meet.

The problem for Sunward and Greenmoss is *not* that actual damage is difficult to trace to D&B; it is that actual damage simply does not exist. There are

⁴ A Vermont plaintiff who seeks compensation for fraud is only "entitled to 'recover such damages. . . as will compensate him for loss or injury *actually* sustained and place him in the same position that he would have occupied had he not been defrauded.'" *Conover v. Baker*, 134 Vt. 466, 365 A.2d 264, 268 (1976) (emphasis added). In such a case the burden is on the plaintiff "to show, not only that [he has] been damaged by the fraud of the defendant, but also to show facts necessary for the proper and correct computation of damages." *Larochelle v. Komery*, 128 Vt. 262, 261 A.2d 29, 33 (1969).

certainly no causation problems in the case before the Court. The false report at issue was sent to a small, readily identifiable audience. The five recipients of D&B's Special Notice were all presumably available to testify, but none of them were called by Greenmoss. Had the Special Notice caused actual injury, Greenmoss could have shown this by calling one or more of the five recipients.⁶

Sunward's suggestion that presumed damages somehow aid a prospective plaintiff to discover a defamatory publication is particularly inapt. As Greenmoss concedes, it learned of the false report of bankruptcy within days after the Special Notice was first issued. More important, the possibility that a plaintiff may never discover its cause of action is irrelevant to the issue here: namely, the rules of damage to be applied consistently with the First Amendment once an action has been filed.

Whether or not presumed damages effectuate a state's interest in compensating injury to reputation, that interest is no broader here than it was in *Gertz*. Every argument made in support of presumed damages was before the Court in *Gertz*, and all of them were rejected there. See 418 U.S. at 376 (White, J., dissenting opinion). While presumed damages may

⁶ It is naive of Sunward to suggest that a plaintiff could never learn the extent to which a D&B report had been distributed. As its district manager testified at trial, D&B records the name of each subscriber who receives a particular report. (Tr. 365) A single interrogatory would elicit this information, and that is precisely what happened in this case. See D&B's Answer to Interrogatory No. 11 contained in document entitled "Plaintiffs' Interrogatories to the Defendant and Request to Produce" at 5. The same fact pattern existed in *Sunward*. See Footnote 3, *supra*.

make it easier for plaintiffs to recover damages for defamation, that comes at the cost of overcompensating many, like Greenmoss and Sunward, who have not been injured at all or who have suffered only minor injury at worst. Common law rules presuming injury in fact from proof of a defamatory publication—and permitting uncontrolled arbitrary jury awards of general damages for that presumed injury—impermissibly conflict with the First Amendment. No legitimate state interest justifies this result. *Gertz*, 418 U.S. at 350.

B. The Award of Punitive Damages is Equally Insupportable.

Unable to explain why punitive damages should be any more available against publishers like D&B than against members of the established communications “media,” Greenmoss tries to justify its \$300,000 punitive damage verdict by pretending that its punitive damages had nothing to do with defamation. Greenmoss posits a state interest in “detering repeated, harrassing and persistent conduct taken against [its] citizens.” (Respondent’s Brief at 21) But Greenmoss made no separate claim for repeated, harrassing and persistent conduct in the proceedings below. Its complaint alleged a single cause of action for libel based solely upon the publication of D&B’s Special Notice.

Greenmoss’ argument that its punitive damages are supportable without regard to its defamation claim is based upon a misreading of the trial court’s charge on punitive damages. The trial court permitted the jury to assess D&B’s conduct before and after the publication, but *only* in considering whether Defendant acted with actual malice in the first instance. (J.A. 20) The

trial court instructed the jury to award punitive damages only if it found actual malice in *D&B's* publication:

If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, *that the Defendant acted with actual malice in publishing the article in question*, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed.

(J.A. 20) (emphasis added). In short, subsequent conduct was to be considered only insofar as it reflected defendant's state of mind when the erroneous report was published. The charge cannot be read as permitting punitive damages without regard to the publication or based on conduct quite apart from the act of publishing the report.*

Greenmoss is equally misguided when it argues that the trial court's instructions on mitigation of damages somehow limited the jury's discretion more here than in *Gertz*. (Respondent's Brief at 21-22) To the contrary, the jury was given complete discretion to assess any amount it chose, however unreasonable. Far from illustrating how a trial court can curb a jury's passions with carefully framed instructions, this case presents a clear example of what troubled the Court in *Gertz*—"punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual

* Although it utilized the undefined words "actual malice," the trial court failed to charge the actual malice standard of *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964). See Brief of Petitioner at 7.

harm caused”⁷—imposed in this case by a jury given free reign to punish an out-of-state corporation whose business the jury did not like.

Recognition that actual malice is a constitutional prerequisite to punitive damages in all defamation cases would prevent unjust, inconsistent verdicts. The different treatment given to the punitive damage issue in *Sunward* highlights the First Amendment problem in this area. As *Sunward* notes on page 13, n.14, of its brief, the trial judge in *Sunward* withdrew the punitive damage issue from the jury as a result of D&B's prompt notice to subscribers of an error in its reports about *Sunward*. D&B gave the same prompt notice here, but the trial judge did not feel similarly constrained. Instead, he gave the jury discretion to award punitive damages, placing no limits on that discretion apart from a vague, standardless charge on mitigation. (J.A. 20) An actual malice rule would have caused both cases to be treated alike and would have prevented the arbitrary, excessive verdicts reached.

II.

THE INFORMATION PUBLISHED BY D&B CONCERNING GREENMOSS IS NOT “COMMERCIAL SPEECH.”

Avoiding the lack of any legitimate, identifiable state interest to support the award of presumed and punitive damages in this case, Greenmoss simply labels the Special Notice as “commercial speech” and concludes that D&B is unworthy of First Amendment

⁷ 418 U.S. at 350.

protection. The "commercial speech" doctrine, however, has no application to the speech at issue.

Greenmoss admits that D&B's publication was not an advertisement and did not propose a commercial transaction. (Respondent's Brief at 15, 23-24) It also concedes that the publication did not consist of statements made in the economic interest of the speaker. (Respondent's Brief at 23-24) Nothing in the Special Notice promoted the speaker or the speaker's product. D&B's report concerns information about a third party, published to entities with whom D&B already had established a relationship. The hallmarks of "commercial speech" are therefore lacking here.

The "commercial speech" cases decided by the Court have concerned the validity of state regulation of advertising and closely related methods of commercial solicitation. Each recent case in which the Court has refined the contours of "commercial speech" has involved attempts to regulate or prohibit advertising or related commercial activity. None of them has dealt with defamation. Moreover, the factors used to distinguish "commercial speech" from other speech are unique to advertising or promotional activity. See, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising by pharmacists); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (restrictions on attorney advertising and solicitation); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (attorney advertising and solicitation); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (signs advertising sale of residential property); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service*

Commission, 447 U.S. 557 (1980) (advertising by a public utility); *Bolger v. Youngs Drug Products Corp.*, — U.S. —, 103 S.Ct. 2875 (1983) (birth control advertisements).⁸

Despite the inapplicability of the "commercial speech" doctrine even under its most expansive interpretation, Greenmoss and Sunward make three arguments for treating the Special Notice as "commercial speech." The first, that the publication lacks constitutional merit merely because it deals with business matters, ignores this Court's decisions to the contrary. *E.g.*, *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."). The second argument is the equally simplistic claim that publications made for profit must be branded "commercial speech." That claim was discredited more than thirty years ago. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are

⁸ Greenmoss' discussion of the "hardiness" and "easily verifiable" nature of "commercial speech" has no application here. When the *Central Hudson* Court spoke of "commercial speech" as "hardy," it referred merely to the fact that the speaker has an interest in disseminating messages encouraging participation with him in commercial transactions which renders the speech "not particularly susceptible to being crushed by overbroad regulation." 447 U.S. at 564 n.6. It has also been said that "commercial speech" is easy to verify since it does not depend upon material gathered from outside sources or about other persons, but concerns the speaker's own product or service. Properly understood, these attributes of "commercial speech" thus have no application to the D&B publication at issue.

published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."'). Since then, the idea that profit motives are antithetical to the First Amendment has been rejected whenever it has reappeared. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Virginia State Board*, 425 U.S. at 761.

Greenmoss' final argument, that D&B's Special Notice is not of general concern or public interest, harkens back to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), where a similar public interest notion was brought into the law of defamation. In *Gertz*, of course, that notion was abandoned because it was both overbroad and underinclusive. 418 U.S. at 346. *Rosenbloom's* short-lived "public interest" test failed to produce an acceptable accommodation of constitutional concerns and the interests served by remedies for libel. There is no reason to believe that the *Rosenbloom* approach would have any better results if applied as a means of formulating a "commercial speech" exception to the First Amendment.

For the reasons expressed above, all of the "commercial speech" arguments in this case are fatally flawed.* More important, none of the "commercial

* It has been argued that a common law qualified privilege available to commercial credit reporting companies in many states would afford adequate protection to D&B. The underlying premise of that argument is that D&B's Special Notice constitutes "commercial speech" and may therefore be assigned a lesser level of protection. Because that premise is false, the argument need not be considered further. The Court should recognize, however, that the qualified privilege argument has no application here, since Vermont does not recognize the privilege. (J.A. 40)

speech" arguments addresses the fundamental issue before the Court. Why should the statement "Greenmoss is bankrupt" be subject to First Amendment limits on presumed and punitive damages when it appears on page 17 of *The Burlington Free Press*, but not when it appears in one of D&B's reports? As the following section shows, no persuasive reason has been offered for a rule that would create vast, speaker-based differences in exposure to damages arising from the same defamatory words.

III.

THE FIRST AMENDMENT DRAWS NO DISTINCTION BETWEEN "MEDIA" AND "NON-MEDIA" DEFENDANTS.

In an effort to explain why "media" defendants should have greater First Amendment rights, Greenmoss argues that the First Amendment protects only speech relevant to "self-government" or to some other arbitrarily chosen set of values. The problems with that argument are set forth in the Brief of Petitioner at 23-27. Greenmoss' analysis also fails to recognize that the content of the message cannot be used to justify a constitutional distinction between "media" and "non-media" speakers. "Media" speech has no monop-

Furthermore, adopting state law rules of privilege as a means of effectuating the First Amendment would invert the Supremacy Clause, subjecting fundamental constitutional rights to the vagaries of state law. Since standards of conduct necessary to defeat the privilege range from simple negligence through gross negligence to spite, a holding that made state law determinative would lead to conflicting decisions.

oly on the values identified. (Brief of Petitioner at 26-27)

Moreover, the publication dismissed so easily by Greenmoss as a "credit report" plays a central role in the structuring of business relationships, which is what the free flow of business information is all about:

The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.* Baumol, *Economic Theory and Operations Analysis*, 249-256 (1961); Braff, *Microeconomic Analysis*, 259-276 (1969); Dorfman, *Prices and Markets* 128-136 (3d ed. 1967).

The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication. There is no doubt that an adverse credit rating can injure a subject. But one injured can inform his suppliers and creditors that a report is misleading. Indeed, in this case, Dun & Bradstreet, Inc. was willing to print a retraction. It is difficult to credit a claim that the "general damages" suffered by the respondent resulted from the short-term confusion between the mispublication and the retraction. In any event, . . . such speculative costs of unfettered communica-

tion are preferable to the chill upon free expression that the libel laws impose.

* Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), arising out of a squabble over whether a vendor had sold obscene magazines.

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905-06 (1971) (Douglas, J., dissenting from denial of certiorari).

Here, as in *Gertz*, the Court is not called upon to protect false speech itself but, rather, to tolerate a range of error so that truthful information will not lose its utility. D&B's subscribers depend upon its reports to make business decisions, which often must be made quickly. If a credit applicant suffers a downturn in business while its application for credit is pending, the creditor would want to know that fact immediately. But if D&B were subject to unlimited awards of presumed and punitive damages in the manner of the *Greenmoss* and *Sunward* verdicts, D&B would be reluctant to report the applicant's changed financial circumstances, at least until the information could be triple checked. As a result, even though the information might be dispatched to the creditor eventually, it might come too late for the information to be of any practical use.

Greenmoss argues that D&B is wrong in insisting that failure to reverse the lower court's decision would pave the way for *ad hoc*, inconsistent results. Accord-

ing to Greenmoss, it would be an easy matter for the Court to hold that D&B has lesser First Amendment rights than "media" defendants simply because of the medium involved, or, as Sunward puts it, "[a] credit report is a credit report." That argument begs the question. It fails to explain what there is about a credit report that makes it different from other forms of speech. At the same time, it ignores striking similarities between D&B reports and newspapers. Both report on court proceedings. To obtain information, D&B and the newspaper send reporters to the courthouse. Both the D&B reporter and the newspaper reporter summarize facts reflected by court records. Each reporter's information is then reviewed and edited. Both D&B and the newspaper want the information to reach their subscribers without delay, fearing that delay would deprive the information of its utility. Finally, readers of both the newspaper and D&B reports use the information to structure private economic relationships. Given these similarities, it would be anomalous to subject D&B to unlimited exposure to damages for libel while limiting the newspaper's exposure for the very same speech.¹¹

Even so, Greenmoss insists that *Gertz* should not apply to "non-media" defendants "since in most non-media cases, particularly those which involve credit reporting agencies common law privileges are usually available." (Respondent's Brief at 31) That argument ignores the fact that no such privilege was available here. It also fails to consider that common law privi-

¹¹ Greenmoss' argument that "media"/"non-media" distinctions in presumed and punitive damage limitations are justified by the "of the press" clause in the First Amendment is invalid for reasons expressed at 14-20 of the original Brief of Petitioner.

leges are available to "media" and "non-media" defendants alike. It is a rare case in which a "media" defendant would have no common law privilege to assert against a claim of libel.

Next, Greenmoss argues that plaintiffs defamed by "media" defendants have a "right of reply," but that the "credit reporting medium" affords no opportunity to counteract false statements of fact. Greenmoss is wrong on both counts. First, D&B voluntarily printed a retraction of its false statements about Greenmoss within days after the Special Notice was issued, counteracting the false report. Second, an individual's "right of reply" to "media" defamation is entirely dependent upon the "media" party's willingness to publicize the individual's point of view. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Few letters to the editor actually appear in print.

As a corollary to its right of reply argument, Greenmoss declares that where "non-media" defamation is concerned it would be difficult to discover and correct a false publication. As discussed above, that has nothing to do with the situation here: one who does not discover the source of a defamatory statement does not benefit from presumed and punitive damages because he is not in court. Despite what Greenmoss says, it is far more likely that one of the recipients of a "non-media" publication would alert the defamed party to what had been said. In "non-media" cases the defamed person or entity is also far more likely to be dealing with a small group of suppliers, customers or others who can be contacted easily for the purpose of correcting any false statement made.

In short, Greenmoss does not meet the problems with the "media"/"non-media" distinction, upon which the Vermont Supreme Court based its decision that First Amendment limitations on presumed and punitive damages do not apply to D&B. The distinction is analytically indefensible and unworkable in practice. The distinction cannot be justified, nor can its infirmities be eclipsed, by *ad hoc* and inaccurate characterization of the nature of the particular speech at issue here. To the contrary, the arguments contained in Greenmoss' brief furnish a perfect example of the morass of case-by-case adjudication which will ensue should this Court affirm the decision below.

IV.

SINCE BOTH THE VERMONT TRIAL COURT AND THE VERMONT SUPREME COURT CONSIDERED AND DECIDED THE CONSTITUTIONAL ISSUES PRESENTED HERE, D&B'S CLAIMS ARE PROPERLY BEFORE THIS COURT.

Even though Greenmoss never made the argument in the lower courts, it now contends that D&B failed to preserve its First Amendment claims. That contention has no merit. The Vermont trial court based its grant of a new trial on the First Amendment arguments made by D&B. The Vermont Supreme Court quite clearly heard and decided D&B's contention that the First Amendment precludes an award of presumed and punitive damages for libel absent proof of actual malice. (J.A. 36-40)

Under this Court's decisions, "There can be no question as to the proper presentation of a federal claim

when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). "[I]t is irrelevant to inquire how and when a federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Insurance Co. of New York v. Cohen*, 234 U.S. 123, 134 (1914); accord, *Whitney v. California*, 274 U.S. 357, 360-61 (1927) (setting aside dismissal for want of jurisdiction where the record did not show defendant raised any federal question in state court, but where it appeared that state Court of Appeals had in fact considered and decided the question before the Court); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("[W]hether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."); *Hess v. Indiana*, 414 U.S. 105, 106 n.2 (1973) ("Since the Supreme Court of Indiana considered and resolved each of Hess' constitutional contentions, it is apparent that it regarded Hess' actions in the state courts as sufficient under state law to preserve his constitutional arguments on appeal.")¹²

¹² See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967):

Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below. Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. State of Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288. Where the ultimate effect of sustaining a

The cases cited by Greenmoss in support of its waiver argument do not hold to the contrary. That argument is, therefore, without merit.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

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JAN 23 1984

No. 83-18

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

v.

Petitioner,

GREENMOSS BUILDERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF VERMONT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE IN SUPPORT OF
RESPONDENT GREENMOSS BUILDERS, INC.

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Sunward Corporation

No. 83-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

v.

Petitioner,

GREENMOSS BUILDERS, INC.

Respondent.

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF RESPONDENT
GREENMOSS BUILDERS, INC.

Sunward Corporation respectfully moves for leave to file the accompanying Brief Amicus Curiae. The consent of Respondent Greenmoss Builders, Inc., has been obtained. The consent of Petitioner Dun & Bradstreet, Inc. was requested but refused.

The interest of Sunward Corporation in this case arises from its position as a party to a case presently pending in the United States Court of Appeals for the Tenth Circuit involving the issue of whether the limitations on awards of presumed damages for libel set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to nonmedia defendants. *Sunward Corp. v. Dun & Bradstreet, Inc.*, appeal docketed, No. 83-2644 (10th Cir. Dec. 23, 1983).

In the instant case, the Vermont Supreme Court held that Dun & Bradstreet was not entitled to a common law qualified privilege (although the trial court had instructed the jury regarding the privilege), and that *Gertz* does not

prohibit presumed and punitive damages when a private plaintiff sues a nonmedia defendant. While the *Sunward* case to which Amicus Curiae is a party presents the same issue regarding *Gertz*, the case differs in two critical respects from the case before the Court: (1) the trial court in *Sunward* followed the majority rule and extended a common law qualified privilege to the credit reports of Dun & Bradstreet, and (2) only presumed, and not punitive, damages were awarded. Because the Vermont Supreme Court refused to extend a common law privilege to Dun & Bradstreet, and the bulk of the damages awarded were punitives, the parties in the case before the Court may not fully address either the state interest in allowing presumed damages, or the common law privilege accorded credit reporting agencies. The following brief focuses on these two aspects of the law of libel, which could affect the Court's disposition of the issue presented for review.

Respectfully submitted,

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SUMMARY OF ARGUMENT

Presumed damages in business libel situations serve the legitimate state interest of compensating defamed plaintiffs. The majority of states, however, protect Dun & Bradstreet from liability, and accordingly from presumed damages, by extending a qualified privilege to credit reports. Thus, a plaintiff cannot recover presumed damages except in instances when Dun & Bradstreet has acted recklessly or maliciously. Although this culpability requirement differs from the reckless disregard standard defined in the Court's decisions in *New York Times*, *St. Amant*, and *Gertz*, it adequately protects Dun & Bradstreet from self-censorship because of the characteristics of the type of commercial speech in which Dun & Bradstreet engages.

ARGUMENT

I. Background — The Media/Nonmedia Distinction Is Not Dispositive of This Case.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), the Court recognized that the states have a legitimate interest in compensating plaintiffs for harm caused by defamatory speech. This interest, however, must be balanced against the concerns embodied in the First Amendment. After examining these concerns, the Court held in *Gertz* that the states could not allow presumed or punitive damages, at least in the absence of knowledge of falsity or reckless disregard for the truth by the defendant. *Id.* at 349. It was unclear whether the latter holding was a uniform pronouncement applicable to both media and nonmedia defamation cases.¹ The Court has since suggested on at least two occasions that the applicability of *Gertz* to nonmedia cases is an open question. *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 309 n.16 (1979). See also *Miskovsky v. Oklahoma Publishing Co.*, 51 U.S.L.W. 3284 (U.S. Oct. 12, 1982) (Rehnquist, J., dissenting from denial of cert.) (*Gertz* did not "wipe out" the common law of libel).

State and lower federal courts are in conflict on the application of *Gertz*. Some have limited *Gertz* to cases involving media defendants, see, e.g., *Denny v. Metz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 103 S. Ct. 179 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); others have extended its protection to all defendants, see, e.g., *Beneficial Management Corp. v. Evans*, 421 So.2d 92 (Ala. 1982); *DeCarvalho v.*

1. *Gertz* involved a "media" defendant and the opinion repeatedly used media references. See, e.g., 418 U.S. at 340 ("publisher or broadcaster"), 341 ("news media"), 342 ("press"), 345 ("communications media"). The Court's opinion used such terms as "publisher or broadcaster" and "news media" over 15 times. See Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv.L.Rev. 1876, 1877 n.9 (1982).

daSilva, 414 A.2d 806 (R.I. 1980). As Dun & Bradstreet stresses in its Brief, commentators have both decried this further complication to the "chaotic" law of defamation and criticized what they view as a baseless distinction between the "press" and the "rest of us." See, e.g., Christie, *Injury to Reputation and the Constitution: Confusion and Conflicting Approaches*, 75 Mich.L.Rev. 43, 58 (1976). They have argued that consistency and fairness required uniform application of *Gertz*. But see Stewart, *Or Of The Press*, 26 Hastings L.J. 631 (1975) (asserting that *New York Times* and its progeny are based on the press clause). See also Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983) (challenging historical view that speech and press clauses are equivalent or redundant).

Dun & Bradstreet is a peculiar standard bearer to be advancing the cause of the commentators. First, the alleged chaos in state defamation law does not apply to Dun & Bradstreet. In fact, the law of defamation is rather consistent regarding credit reporting agencies.² Congress has largely preempted the common law concerning consumer reporting agencies, 15 U.S.C. §§ 1681 to 1681t (1976),³ and the majority rule recognizes a common law qualified privilege for commercial reporters such as Dun & Bradstreet.

On the surface, the argument that the First Amendment should not play favorites presents a more difficult issue. In its

2. Even if defamation law for credit reporting agencies were inconsistent, this alone would not mandate an across-the-board application of the First Amendment. The possibility of different legal standards among the states is inherent in our federal system. *Gertz* recognized this basic tenet of federalism. 418 U.S. at 345-46.

3. Acceptance of Dun & Bradstreet's argument would raise questions about the constitutionality of sections of the Fair Credit Reporting Act ("FCRA"). If no distinctions can be drawn between the media and credit agencies, the requirements imposed by the FCRA would appear to be unconstitutional restraints on free speech. Even limiting the question to presumed and punitive damages causes concern. The FCRA allows punitive damages for "willfull" noncompliance with its requirements. 15 U.S.C. § 1681n. A credit agency might thus be liable for punitive damages based

Brief, Dun & Bradstreet exploits the many problems that might arise from a media/nonmedia distinction. The hard questions Dun & Bradstreet poses, however, are inapposite here. Regardless of how one distinguishes between the media and nonmedia, it is clear that Dun & Bradstreet belongs in the latter category. Indeed, Dun & Bradstreet has never claimed otherwise. More importantly, Dun & Bradstreet's broad-based argument has little to do with its credit reports. These reports are not part of the "robust debate of public issues," which inspired *New York Times v. Sullivan* and its progeny.⁴

To resolve this case, the Court need not decide whether the Constitution should distinguish between the media and nonmedia. Instead, the critical inquiry is whether, in light of the state interest in compensating defamed plaintiffs, presumed damages impermissibly cause self-censorship of a specific type of commercial speech. The answer to that question requires an examination of the following factors: (1) the state

upon a culpability finding that differs from the Court's "actual malice" standard. See generally *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976). In *Collins*, the court found willful noncompliance with the Act, as well as a common law libel. However, the court's findings are based on the credit agency's conduct; no mention is made of knowledge of falsity or subjective doubts about the truth of the report. See also *Rasor v. Retail Credit Co.*, 87 Wash.2d 516, 554 P. 2d 1041, 1049 (1976) (regarding preemption of common law, "the intent of Congress in framing the Fair Credit Reporting Act was simply to limit recovery for presumed injury to instances of "malice and willful intent" . . .). Common law "malice" or "willful intent" may differ substantially from the *New York Times/St. Amant* protection requested by Dun & Bradstreet. See Part III *infra*.

4. Dun & Bradstreet defends this aspect of its reports, which was emphasized by the Vermont Supreme Court, by arguing that content-based distinctions have been condemned by the Court. This not only ignores the Court's commercial speech cases, discussed in Part IV *infra*, it also overlooks the concerns that underlay *Gertz*' rejection of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). A credit report is a credit report. In evaluating these reports, courts would not be called upon to make ad hoc determinations of what is of "public interest" or "relevant to self-government." See *Gertz*, 418 U.S. at 346.

interest in allowing presumed damages, (2) the level of protection provided by the common law, and (3) the specific nature of the speech engaged in by Dun & Bradstreet. Analysis of these factors reveals that the concerns announced in *Gertz* regarding presumed damages are inapplicable to libelous Dun & Bradstreet credit reports. The common law provides adequate protection for these reports and therefore this Court should not intrude on state law via the Constitution.⁵

II. The States Have A Legitimate Interest in Preserving The Doctrine of Presumed Damages.

Gertz recognized that the states have a legitimate interest in providing compensation to defamed plaintiffs. 418 U.S. at 348. The doctrine of presumed damages is a method for achieving this interest. The Colorado Supreme Court has cogently stated the basis for the doctrine:

The rationale for this rule derived from the difficulty of proving damages in [slander per se situations]. This is particularly true where, as here, the defamatory remarks are related to the conduct of an individual's business affairs. It is the rare case in which a slander will destroy business profits in such a way that the loss can be directly traced to the slanderous remarks.

Rowe v. Metz, 195 Colo. 424, 579 P.2d 83, 84 (1978).

5. A noted commentator discusses First Amendment methodology in terms of a distinction between the scope of protection provided by the First Amendment, contrasted with the level of protection provided. Shreffin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915 (1978). A ruling that *Gertz* applies only to the media would arguably be a ruling based on the scope of the First Amendment. The position of Amicus Curiae is a "level of protection" argument. In essence, its position is that, even if the Constitution protects Dun & Bradstreet reports, the protection provided by the common law equals or exceeds that required by the Constitution.

Nowhere is this rationale more applicable than in situations involving Dun & Bradstreet reports. It may be extremely difficult for a plaintiff to link directly the Dun & Bradstreet report either to a decline in sales or to a loss of potential business.

The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary casual connection, may be reluctant to testify that the publication affected their relationship with the plaintiff.

Note, Developments in the Law — Defamation, 69 Harv.L. Rev. 875, 891-92 (1956) (hereinafter cited as *Developments*). Not only are business people naturally reticent in revealing the basis for a decision, but Dun & Bradstreet contributes to this silence by insisting in its subscriber contracts that it not be revealed as a source of information.⁶ (A standard Dun & Bradstreet subscriber contract is appended as Appendix A.) A subscriber who revealed that Dun & Bradstreet was the source of information would be in breach of this contract of silence.⁷

6. It is ironic that Dun & Bradstreet relies so heavily on First Amendment values, while at the same time placing such strict limitations on the "free flow" of information contained in its reports.

7. The typical Dun & Bradstreet contract contains restrictions such as the following:

All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law.

....

Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference

See Appendix T1 2 & 5, at A-2.

A plaintiff would be hard pressed to establish with any certainty that a false Dun & Bradstreet report was decisive in causing a lost sale, especially if the effect of the Dun & Bradstreet report was indirect (i.e., it caused a pernicious rumor, which in turn affected the final business decision). In fact, in the face of Dun & Bradstreet's contracts of silence, a potential plaintiff might never learn that Dun & Bradstreet had spoken ill of it, much less determine that Dun & Bradstreet was the source of a damaging rumor.⁸ The plaintiff also would face tremendous problems in trying to locate or identify lost potential business. One would not know which customers failed to make initial contact because of either a Dun & Bradstreet report, or a rumor whose source was the report.

The doctrine of presumed damages, much like *res ipsa loquitur* in a similar context, helps a plaintiff overcome these formidable difficulties. Indeed, an analogy to *res ipsa loquitur* is particularly appropriate in circumstances involving Dun & Bradstreet reports. Even if a plaintiff cannot directly establish lost sales because of a defamatory report, it is counter-intuitive to assert that such a report by this ubiquitous and highly respected organization is not harmful. Without the presumption of damages, however, a plaintiff which has suffered substantial harm may not reach the jury because of a lack of causal proof. Under these circumstances, the appropriateness of the presumption is clear. See *Developments* at 892 ("The application of such presumptions should depend upon the potentiality of harm to the particular plaintiff from the publication in question . . .").

In *Gertz* the Court recognized that presumed damages, unlike punitives, are relevant to the state interest of compensating defamed parties. 418 U. S. at 350. Somewhat contradictorily, however, the Court called the presumption "an oddity of tort law" because it "allows recovery of purportedly compensatory damages without evidence of actual loss." *Id.* at 349. While perhaps true in situations involving harm of a

8. This factor alone distinguishes Dun & Bradstreet from the news media.

less tangible nature, this reasoning does not apply to the typical business libel where the injury is real, but proof of causation may be difficult. Additionally, it would be ironic to deny the presumption in light of the Court's statement that "actual damages" may include intangible harm such as mental suffering. 418 U. S. at 350. Causal proof of these type of damages is arguably easier to present than is proof of lost business. See *Time, Inc. v. Firestone*, 424 U. S. 448 (1976). Moreover, the value a jury might attach to these intangible damages is largely unbounded.

The doctrine of presumed damages in a business libel context does not leave a jury with unbridled discretion to award any amount of damages it desires. Damages cannot be based on pure speculation. They must bear some relationship to the injuries sustained. See, e.g., *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 474-77 (9th Cir. 1977). Thus, particularly in the context of a business libel, a plaintiff will present evidence either of a decline in profits, or of a failure to achieve expected growth following the defamatory statement.⁹ The defendant may challenge these figures or present proof attributing the losses to other factors. The jury must resolve the evidentiary disputes and arrive at a damage calculation. The trial judge is available to ensure that this calculation is supported by the evidence. Therefore, in the business libel context, rather than being merely an "oddity of tort law," presumed damages serve an important function in allowing states to compensate defamed parties.

9. When "special" damage need not be shown, "general" damage may be recovered. That such damage has been suffered need not be proved by the Plaintiff, for it is presumed, but it is customary to make proof of some of the items. The elements of "general" damage [include] . . . loss of business

III. The Level of Common Law Protection Afforded Dun & Bradstreet is Adequate and Appropriate.

While Dun & Bradstreet bemoans the disparate treatment it receives under the First Amendment as compared to the media, in reality Dun & Bradstreet was a favorite child of the common law long before this Court introduced the Constitution to the law of defamation. In recognition of the important role credit reports play in the commercial world, the majority of states extend a common law qualified privilege to Dun & Bradstreet reports. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602, 607 (D. Colo. 1983) (citing cases). The reason for this privilege is that

[t]hose about to engage in a commercial transaction like to know something about the persons with whom they are dealing. Often they are unable to get that information themselves and must obtain it through mercantile agencies. In furnishing such information, the agencies are supplying a legitimate business need and ought to have the protection of the privilege. Without such protection, few would undertake to furnish the information, and the cost would be high, if not prohibitive.

L. ELDREDGE, *THE LAW OF DEFAMATION* § 86, at 468-69 (1978) (quoting *In re Retailers Commercial Agency Inc.*, 342 Mass. 515, 174 N.E.2d 376, 379 (1961)).¹⁰

The standard of conduct necessary to overcome the privilege varies slightly from state to state.

Most require a showing of something more than mere negligence to defeat the privilege. To prevail, a

¹⁰ Several courts, including the Vermont Supreme Court in the present case, have questioned the wisdom of the reasoning underlying the privilege. See, e.g., *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973). This Brief will not pursue this dispute. Note, however, that Professor Eldredge feels that cases such as *Hood* "should lead some other courts to reconsider their present rule in this situation." L. ELDREDGE, *supra* p. 9, § 86, at 469 n. 70.

plaintiff generally must show the credit agency was reckless in conducting its investigation. Bad faith, intent to injure, or ill-will also defeat the privilege.

R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 308 (1980) (footnotes omitted). See Annot., *Sufficiency of Showing of Malice or Lack of Reasonable Care to Support Credit Agency's Liability for Circulating Inaccurate Credit Report*, 40 A.L.R. 3d 1049 (1971). Although a court might refer to the standard as "reckless disregard for the truth," recklessness is often defined in the common law sense of "wanton and reckless disregard of the circumstances," rather than as defined by the Court in *St. Amant v. Thompson*, 309 U. S. 727 (1968) ("reckless disregard" defined as subjective doubt about the truth). See, e.g., *Roemer v. Retail Credit Co.*, 3 Cal. App.3d 368, 83 Cal. Rptr. 540, 542 (1970). See also *Cantrell v. Forest City Publishing Co.*, 419 U. S. 245, 250 n.3 (1974) (in a "false-light" case, trial court required reckless disregard for truth, but defined "recklessly" as "wantonly, with indifference to consequences"); *Williams v. Burns*, 463 F. Supp. 1278, 1283 (D. Colo. 1979) (discussing showing necessary to overcome a qualified privilege under Colorado law). Similarly, a showing of "malice" might overcome the privilege. This is not necessarily "malice" in the sense of ill-will, or "actual malice" as defined by this Court. Neither is it malice implied solely from the defamatory statement itself. Rather "[m]alice . . . can consist of an unreasonable and wrongful act done intentionally, without just cause. . . . Malice may be inferred in the situation where the defendant has no reasonable basis for believing that the statement is true. This would be the case where there had been a failure to make an adequate investigation." *Brown v. Skaggs-Albertson's Properties, Inc.*, 563 F.2d 983, 986-87 (10th Cir. 1977) (applying Oklahoma law and citing *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972)). Regardless of the exact definition of "reckless" or "malice", a high degree of culpability on the part of Dun & Bradstreet is a predicate to liability. Therefore, in the majority of states Dun & Bradstreet is subject neither to liability

without fault nor liability based on simple negligence.¹¹ Since presumed damages are irrelevant absent basic liability, Dun & Bradstreet need not worry about these damages except when its conduct is highly culpable.¹²

The type of conduct that causes Dun & Bradstreet to lose its privilege — recklessness or maliciousness — is seated in well-developed concepts of tort law,¹³ which are arguably easier for the average juror to grasp than is the concept of “actual malice.” See Hunter, *A Reprise on Herbert v. Lando and the Law of Defamation*, 71 Ky.L.J. 569, 574-77 (1982-1983). The facts of this case demonstrate that these tort concepts are better suited for evaluating Dun & Bradstreet’s conduct than is the subjective inquiry mandated by *St. Amant* and *Herbert v. Lando*, 441 U.S. 153 (1979). Here, Dun & Bradstreet issued a report based on information from an untrained high school student without any verification of the information. Yet Dun & Bradstreet blithely asserts in its brief that no “reckless disregard for the truth” existed because no one questioned the good faith of Dun & Bradstreet’s teenage reporter. In the *Sunward* case, the Dun & Bradstreet reporter described the information in the reports as “guesstimates.” These guesstimates portrayed Sunward as a company with annual sales,

11. In *Gertz* the Court emphasized the potential chilling effect of liability without fault. 418 U.S. at 346. Because of the common law privilege, this concern is inapplicable to Dun & Bradstreet credit reports.

12. The applicability of presumed damages will also depend on whether the statement is libelous per se, or, in most states, on whether the statement would have been slanderous per se if spoken. In other words, Dun & Bradstreet is subject to presumed damages when a report is libelous on its face, or, in those states that have incorporated the four “slander per se” categories into their law of libel, when a report would tend to injure a plaintiff in his trade or business. See generally R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 96-98 (1980).

13. This is not to suggest that these concepts are free from doubt in the abstract. See *Smith v. Wade*, 51 U.S.L.W. 4407 (U.S. Apr. 20, 1983). They are, however, given meaning by their development in the tort law of each state. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 457, cert. denied, 423 U.S. 1025 (1975) (“term ‘reckless disregard’ has had rather frequent usage in the tort field in this state”).

according to Dun & Bradstreet, of less than \$1 million, when in fact sales approached \$30 million. Dun & Bradstreet fails to suggest why the Constitution should protect its recklessly indifferent behavior. In fact, the Court's commercial speech cases suggest that the Constitution does not prohibit the states from reaching conduct likely to produce such inaccurate information.

IV. Credit Report "Speech" Requires Less Protection Than Does Other Speech.

Under the common law of most states, Dun & Bradstreet must be reckless or malicious before it feels the potential chill brought on by presumed damages. This Brief now turns to the question of whether the Constitution mandates an even higher level of culpability before the states can allow presumed damages. This question will be addressed within the context of the kind of speech in which Dun & Bradstreet engages. When protection of commercial speech is balanced against the states' legitimate interest in allowing presumed damages, the conclusion must be that the common law provides Dun & Bradstreet with adequate protection and that constitutional intervention on the part of this Court is unwarranted.

Approximately two years after *Gertz*, the Court extended constitutional protection to commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Court distinguished then, and has continued to distinguish, commercial speech from other speech. See, e.g., *Central Hudson Gas and Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980). Justice Powell's opinion in *Virginia State Board* noted that, because of its economic nature and ease of verification, commercial speech is less subject to self-censorship than other speech. 425 U.S. at 772 n.24. See also *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978) (in rejecting application of overbreadth doctrine to commercial speech, the Court stated that "[c]ommercial speech is not as likely to be deterred as noncommercial speech"). In

fact, Justice Powell noted that the protections set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), might be unnecessary for commercial speech, and specifically compared *New York Times* with a case in which Dun & Bradstreet was a party, *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971) (denying cert.). The Court has reaffirmed the distinctive nature of commercial speech in more recent cases. See, e.g., *Hudson Gas*, 447 U.S. at 564 n.6.

Justice Powell's general analysis of commercial speech fits perfectly in the specific context of Dun & Bradstreet reports. First, these reports are undeniably commercial speech. See *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (opinion by Justice Clark). They are about businesses, and are distributed to a limited audience that pays for the reports. They assist that audience in evaluating commercial transactions. See generally *Hudson Gas*, 447 U.S. at 561-62. Second, the information in a typical Dun & Bradstreet report is easy to verify. The reports concern sales figures, payment habits, financial status and the like. Each of these matters tends to be a black or white fact. Moreover, Dun & Bradstreet has an elaborate system for obtaining and verifying these facts.¹⁴ Third, Dun & Bradstreet's financial status and the extent of its distribution system reveal the economic hardiness of its reports. Dun & Bradstreet is a multi-million dollar enterprise (its net income in 1982 was \$34,249,000), supplying information on "over 4.5

14. In cases in which Dun & Bradstreet follow its own training, supervision, and verification procedures, a plaintiff would be hard pressed to establish the degree of culpability necessary for a finding of liability. Unfortunately, these procedures were not followed in the instant case. Similarly, Dun & Bradstreet failed to follow its own third-party verification requirements in the *Sunward* case. Note, however, that Dun & Bradstreet in *Sunward* did follow its procedure of issuing prompt notice to subscribers upon notification of an error in its reports. The trial judge relied heavily on this fact in refusing to submit the issue of punitive damages to the jury, and in submitting an instruction regarding mitigation of damages.

million" businesses to over 80,000 subscribers.¹⁵ Any argument by Dun & Bradstreet that it needs constitutional protection or else its voice will be chilled flies in the face of this reality. In fact, even in states that refuse to extend a common law privilege to credit reporting agencies, Dun & Bradstreet appears to be thriving. See *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974). Moreover, Dun & Bradstreet is in a superior position compared to defamed plaintiffs to absorb the societal harm its reports cause. Dun & Bradstreet can spread its costs among its many subscribers.

These basic distinctions suggest a more fundamental reason why the protections of *Gertz* and *New York Times* should not apply to credit reports. The usefulness of commercial speech is directly tied to its accuracy. *Hudson Gas*, 447 U.S. at 563. Unlike false information concerning public issues, see *New York Times*, 376 U.S. at 279 n.19, inaccurate commercial speech has no redeeming value whatever. Not only is accuracy important for the businesses on which Dun & Bradstreet reports, it is important to Dun & Bradstreet's subscribers. Given this need for accuracy on the part of all concerned parties, Dun & Bradstreet's argument that application of *Gertz* is necessary to avoid self-censorship is untenable. No societal goal is served in allowing Dun & Bradstreet to put forth defamatory material maliciously or after a grossly inadequate investigation.

Dun & Bradstreet will no doubt respond that the argument of Amicus Curiae is "content based." In its decisions developing the commercial speech doctrine, however, the Court has recognized "the 'commonsense' distinction" between commercial speech and other varieties of speech. *Hudson Gas*, 447 U.S. at 562. In fact, "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (quoting *Virginia State Board*, 425 U.S. at

15. This information is derived from documents supplied to Sunward Corporation by Dun & Bradstreet during discovery.

761).¹⁶ While the problems inherent in content regulation might apply to other speakers in other contexts, they are not applicable to commercial speakers such as Dun & Bradstreet. Moreover, in examining commercial speech, the Court has stated that the two features of commercial speech noted above — economic hardiness and ease of verification — permit regulation of its content. *Id.* at 564 n.6. In fact, in *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 462-66 (1978), the Court rejected an argument that actual injury was necessary before a state could regulate an attorney's commercial speech. The Court noted that the state interest in prohibiting the dangers inherent in attorney solicitation justified a prophylactic rule, regardless of whether actual injury occurred. Similarly, the great likelihood that a defamatory credit report will cause harm, accompanied by the difficulty in linking that harm to the report, justifies a state in allowing presumed damages.

The type of speech in which Dun & Bradstreet engages is fundamentally different from the speech that spawned *New York Times* and its progeny. *Gertz* expressed a fear that juries might use presumed damages to punish unpopular speech. 418 U.S. at 349. This possibility is not likely to occur in a situation involving Dun & Bradstreet. The topics on which Dun & Bradstreet speaks are not controversial topics likely to draw a jury's ire. As demonstrated above, presumed damages are based on compensating the plaintiff, and the jury is so

16. Content, however, is not all that distinguishes commercial speech. The audience and purpose behind the speech are also critical. For example, Dun & Bradstreet asks why a distinction should be drawn between information it provides, and the same information published in a newspaper. Petitioner's Brief 29. The newspaper is providing newsworthy information to the general public. Dun & Bradstreet is providing its subscribers with information for the purpose of evaluating commercial transactions. The latter is the essence of commercial speech as discussed in *Hudson Gas*. It is less subject to self-censorship than is the newspaper report.

instructed.¹⁷ If Dun & Bradstreet is recklessly indifferent in its investigation or acts maliciously, then forcing it to pay for this conduct should not be deemed unconstitutional.

The law of defamation, while undoubtedly complex, has gradually evolved in the states. Influenced by the reasoning of *New York Times* and its progeny, it continues to do so. The Court should resist the urge to interfere with this process, especially when premised on such broad-based arguments as those presented by Dun & Bradstreet. Although certain doctrines may be arcane or based on little more than historical accident, this is not the case with the law regarding defamatory credit reports. State and lower federal courts, as well as Congress, are addressing the issues with modern reasoning and responses. They should be allowed to continue to seek the best balance between the competing interests involved. Dun & Bradstreet's position, divorced as it is from the facts, should be rejected.

17. Contrast this with punitive damages where the jury is instructed that the purpose of these damages is to punish the defendant and deter future misconduct. Even here, however, the focus is on the defendant's conduct rather than its speech.

CONCLUSION

Based upon the foregoing, Amicus Curiae Sunward Corporation respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated this 20th day of January, 1984.

Respectfully submitted,

/s/ William E. Murane

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The undersigned subscriber hereby employs Dun & Bradstreet, Inc. to furnish information on businesses in the geographic area covered by the Reference Books listed hereunder for the term beginning _____, 19____, and ending _____, 19____, and agree to pay in advance for:

BASIC SERVICE

_____ Response Units* and Reference Books CHECKED FOR AREA NUMBER _____

☐ WINTER (January) 19____ ☐ SPRING (March) 19____ ☐ SUMMER (July) 19____

☐ FALL (September) 19____ ☐ ADVANCE SUMMER (May) 19____

☐ ADVANCE WINTER (November) 19____ \$ _____

Response Units Above Basic Service

_____ Response Units @ \$10.55 each \$ _____

Less Discount @ \$370.00 per 100 \$ _____

For additional Response Units requested, the subscriber agrees to pay on demand at the rate of \$10.55 each.

Dun & Bradstreet's written response (based on information in-file) to a subscriber's inquiry on a business located in the continental United States (excluding Alaska) furnished by mail is valued as one response unit. The additional response unit values of certain other services appear on the "Schedule of Additional Services" below. Of the total sum shown, \$10.00 is in payment of an Annual Subscription to the magazine "Dun & Bradstreet Reports" if not desired, \$10.00 may be deducted. Additional subscriptions \$10.00 each.

DUNS DIAL SERVICE*

_____ DUNS DIAL Response Units @ \$685.00 per 100

Less Discount @ \$287.00 per 100 \$ _____

For additional DUNS DIAL Response Units requested, subscriber agrees to pay on demand at the rate of \$6.85 each.

DUNS DIAL is an optional telephone service for subscribers desiring immediate information in addition to the written report provided (and charged for) under Basic Service.

Values of available DUNS DIAL services are shown below under Schedule of DUNS DIAL SERVICES.

DUNS FINANCIAL PROFILE REPORTS

_____ DUNS FINANCIAL PROFILE REPORTS—OPTION A

(minimum order of 50 reports, additional reports in blocks of 50)

at the following rate:

_____ \$20. per report, first 100 \$ _____

_____ \$15. per report, over 100 \$ _____

Excess rate \$30. each report

Total Option A \$ _____

Option B or C: Special selection order form attached ☐

SALES DEVELOPMENT, INDUSTRY REFERENCE BOOKS AND OTHER SERVICES

☐ Sales Lead Service (Area _____) \$ _____

☐ Reference Book of Transportation ☐ SPRING...19____ ☐ FALL...19____ \$ _____

☐ Reference Book of Manufacturers ☐ SPRING...19____ ☐ FALL...19____ \$ _____

☐ Apparel Trades Book ☐ FEBRUARY ☐ MAY ☐ AUGUST ☐ NOVEMBER \$ _____

☐ Change Notification Service } SPECIAL SELECTION \$ X X X X X

☐ Exception Credit Update Service } BASIC ORDER FORM \$ X X X X X

☐ (designate) _____ \$ _____

SUB-TOTAL FOR SALES DEVELOPMENT, INDUSTRY REFERENCE BOOK AND OTHER SERVICES... \$ _____

TOTAL \$ _____

SCHEDULE OF ADDITIONAL SERVICES

Business Information Reports	Additional Response Unit Value
On businesses located in Alaska	1
On businesses located in Hawaii	1/2
On businesses located in Puerto Rico	1 1/2
On businesses edited in Analytical format	0
With Continuous Service	1/2
On businesses not in-file	0

SCHEDULE OF DUNS DIAL SERVICES

	DUNS DIAL Response Unit Value
To access and search file	1/4
To provide key points read-out	1
To provide full report read-out	2
To provide One-way Priority Service	2
To provide Two-way Priority service	3
To provide P D Q investigation and response	8

The listed values are subject to change upon 30 days notice. Please contact your Dun & Bradstreet representative for information on other available services.

IMPORTANT

Dun & Bradstreet, Inc. and the undersigned subscriber, by signing this Subscription Agreement, agree to and intend to be bound by the terms hereof including the Terms of Agreement on the reverse side, which are made a part of this subscription.

Accepted

Dun & Bradstreet, Inc.
71-24(700415)

Name of Subscriber Date

Authorized Signature Title

Mailing Address

City State

TERMS OF AGREEMENT

1. All information on businesses furnished to the subscriber by Dun & Bradstreet, Inc. pursuant to this Agreement is for the exclusive use of the subscriber solely as one factor in the subscriber's credit, insurance, marketing or other business decisions relating to corporations, partnerships, sole proprietorships or other business, government or non-profit entities or such entities' stockholders, directors, officers, partners, proprietors or employees in their capacities as such. It is expressly prohibited to use such information as a factor in establishing an individual's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment.
2. All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law. Any question concerning such information should be referred to Dun & Bradstreet, Inc. for verification and/or review with the subject of same. It is expressly understood that the subscriber shall neither request information for the use of others, nor permit requests to be made under this subscription by others.
3. Because of the large number of informational sources upon which Dun & Bradstreet, Inc. must rely, and over which Dun & Bradstreet, Inc. has no control, the subscriber acknowledges that Dun & Bradstreet, Inc. does not and cannot guarantee or warrant correctness or completeness of information furnished. Such information is to be considered current within Dun & Bradstreet, Inc.'s established procedures for revision of same and usually is not the product of independent investigation prompted by each customer inquiry. It is further understood by the subscriber that every business decision, to some degree or another, represents the assumption of a risk, and that Dun & Bradstreet, Inc., in furnishing information, does not and cannot underwrite the subscriber's risk, in any manner whatsoever. Dun & Bradstreet, Inc., therefore, shall not be liable for any loss or injury caused in whole or in part, either by its negligent acts of omission or commission or those of its officers, agents or employees or by contingencies beyond its control, in procuring, compiling, collecting, interpreting, reporting, communicating or delivering information, including, but not limited to, information contained in responses to subscriber's inquiries, Reference Books, Apparel Trades Books, and/or Directories.
4. This Agreement covers service to the subscriber at only a single place of business, unless otherwise stated, and all of the Reference Books and/or Directories loaned at any time shall be kept and used only at the single place of business specified in this subscription, except that the subscriber after first obtaining written permission and complying with written instructions given by Dun & Bradstreet, Inc. may furnish the Reference Books and/or Directories to another to have all or part of the listings copied or duplicated in punched card or other form suitable for further handling or processing for the exclusive use of the subscriber. The Reference Books and/or Directories shall be returned to Dun & Bradstreet, Inc. forthwith without further notice upon receipt by the subscriber of any subsequent edition thereof or at the expiration or termination of this subscription.
5. Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference unless required by law or except upon obtaining written permission from Dun & Bradstreet, Inc., which, without in any way limiting the foregoing, reserves the right, in its absolute discretion, to verify the accuracy of any quotation or statement derived from information obtained from Dun & Bradstreet, Inc. under this subscription.
6. If the cost of serving the subscriber under this agreement is increased as a result of measures prescribed by government authority or by any other cause, then the terms of this agreement for its unexpired period may be revised by Dun & Bradstreet, Inc. to such extent as in its judgment may be necessary to cover the increased costs. In such event, however, the subscriber shall have the option of continuing the agreement on the revised basis, or of discontinuing the service and upon such discontinuance, Dun & Bradstreet, Inc., shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this agreement.
7. This Agreement is not binding upon Dun & Bradstreet, Inc. until accepted by it. Dun & Bradstreet, Inc. hereby reserves the right to terminate this Agreement upon thirty (30) days written notice, with or without reason, in which event it shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this Agreement.
8. If the terms of payment are otherwise than in full in advance, then if any payment provided for is not made when due the whole amount shall immediately become due and payable. Delivery charges and applicable taxes are not included in the Total on the face of this Agreement, and will be invoiced to the subscriber.
9. The rights and obligations of the parties to this Agreement apply from the date of signing to all information, including Reference Books and/or Directories, furnished at any time to the subscriber, whether relating to concerns located within or without the geographical area encompassed by such publications. This written Agreement contains the entire and only Agreement between the parties regarding the subject matter hereof and there are merged herein all prior and collateral representations, promises and conditions. Any representation, promise, guarantee or condition not incorporated herein shall not be binding upon either party. No waiver, or amendment of this Agreement shall be binding on the parties unless in writing, signed by an authorized official of Dun & Bradstreet, Inc. and the subscriber.
10. The above Terms of Agreement apply to the furnishing to the subscriber by Dun & Bradstreet, Inc. of any kind of information on businesses and any kind of business information service, whether or not specifically referred to in this Subscription Agreement and whether or not furnished at additional cost to the subscriber and whether or not currently being furnished by Dun & Bradstreet, Inc. to its subscribers.

Business _____ SIC # _____

Telephone # _____ Subscriber # _____

Signing this Agreement _____ Title _____

Tax Exemption # _____

DEC 22 1983

ALEXANDER J. STEVAS,
CLERK

No. 83-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,
v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

**BRIEF OF THE WASHINGTON POST,
AMICUS CURIAE, IN SUPPORT OF REVERSAL**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-18

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

**BRIEF OF THE WASHINGTON POST,
AMICUS CURIAE, IN SUPPORT OF REVERSAL**

The Washington Post submits this brief as *amicus curiae* in support of petitioner's claim that the presumed and punitive damage awards against it violate the First and Fourteenth Amendments to the Constitution. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE AMICUS

Amicus curiae, The Washington Post, publishes a newspaper of general circulation in the Washington, D.C. metropolitan area.¹ It has been, and is, involved in a number of libel cases in which punitive and presumed damages are sought, and one case in which a plaintiff's verdict (including punitive damages) was returned. (The trial judge entered judgment notwithstanding the verdict in the Post's favor, and the case is on appeal. See p. 14, *infra*.) Because of its involvement in libel litigation in which punitive and presumed damages are sought, the Post has an interest in the development of the legal principles governing such claims.

SUMMARY OF ARGUMENT

Both the Vermont Supreme Court and the petitioner in this case have assumed that punitive and presumed damages may be awarded against the press upon a showing of "actual malice" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and proceeded to pose the question whether nonmedia defendants are entitled to the same protection. In fact, neither *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), nor any other decision of this Court, estab-

¹ The Post is a division of the Washington Post Company, which has the following subsidiaries or affiliates (excluding wholly owned subsidiaries): Bowater Mersey Company Ltd., Robinson Terminal Warehouse Corp., Los Angeles Times-Washington Post News Service, International Herald Tribune, S.A., Bear Island Paper Company (a limited partnership), The Detroit Cellular Telephone Company (a general partnership), and The Washington-Baltimore Cellular Telephone Company (a general partnership). This disclosure is made pursuant to Rule 28.1 of the Rules of this Court.

lishes a firm rule for punitive or presumed damages against the press. *Gertz* did not hold, or state by way of dictum, that punitive or presumed damages may be awarded against any defendant upon a showing of actual malice. Indeed, there was no separate punitive damage award at all in *Gertz*, and the case presented no occasion for the Court to decide whether punitive damages may ever be awarded against the press or any other defendant.

Gertz, in short, left open the question whether punitive or presumed damages may ever be awarded in a defamation case against the press or against a member of the public. The issue in this case, then, is not simply whether there is a basis for distinguishing between media and nonmedia defendants. The issue is whether Dun & Bradstreet, a company that published certain financial and credit information about another company, is entitled to the minimum protection it has asked for—namely, the requirement that actual malice be shown before punitive and presumed damages are awarded against it. *Amicus* agrees that to deny Dun & Bradstreet that minimum protection, and to uphold punitive damages on the facts of this case, would violate the First Amendment.

Dun & Bradstreet has not asked for protection beyond the actual malice standard, and there is therefore no occasion for the Court to consider whether, and under what circumstances, additional protection may be appropriate. It is *amicus*' position, however, that in an appropriate case this Court should hold that punitive and presumed damages may never be awarded in a defamation action. Punitive damages generally, and the unique remedy of presumed damages in defamation cases, are anomalies of the law. Committed largely to the uncontrolled discretion of

juries, these awards often bear no relationship to actual harm done. They can be used to punish unpopular defendants; they encourage unnecessary litigation; and they chill desirable as well as undesirable conduct.

In *Gertz* the Court expressly recognized that these concerns have special force in defamation cases. The Court stated further that the states have "no substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349. The logic of *Gertz* and of the First Amendment itself points ineluctably to the conclusion that punitive and presumed damages may never be awarded in defamation cases.

Recent judicial experience with punitive damages in defamation cases underscores the appropriateness of such a ruling. Massive punitive damage awards of over a million dollars have become commonplace. The fear of these devastating verdicts has chilled the exercise of First Amendment freedoms and threatened the very existence of media outlets ill-equipped to absorb them.

This case does not require the Court to decide whether punitive or presumed damages may ever be awarded against a media or nonmedia defendant, nor does it require the Court to decide whether there are some categories of cases in which punitive damages are inappropriate. The Court need only decide whether *Dun & Bradstreet* is entitled to the minimum protection it has sought in the case—the actual malice standard. The Court should decide that question in the affirmative, and leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

ARGUMENT

I. *GERTZ v. ROBERT WELCH, INC.* LEFT OPEN THE QUESTION WHETHER PUNITIVE AND PRESUMED DAMAGES MAY BE AWARDED IN A DEFAMATION CASE

The Vermont Supreme Court saw the "critical issue" in this case as whether the "qualified protections afforded the media in 'private' defamation actions, as set forth in *Gertz*, [should] be extended to actions involving nonmedia defendants." J. App. 37. Likewise, the petitioner has framed the issue before the Court as "whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz v. Robert Welch, Inc.*, . . . apply to 'nonmedia' defendants." Petition i. This framing of the issue is inadequate. It supposes that the Court has already "enunciated" a rule for media defendants, and that the only remaining question is whether nonmedia defendants are entitled to the same rule. There is no settled rule, however: *Gertz* did not resolve the question whether punitive or presumed damages may ever be awarded against a media defendant. This case therefore cannot be decided simply by asking whether there is a basis for distinguishing between media and nonmedia defendants.

Gertz did not hold that presumed and punitive damages may be awarded against a media defendant in favor of a private libel plaintiff upon a showing of actual malice—that is, knowledge of falsity or reckless disregard for the truth, *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Nor did the Court in *Gertz* make that pronouncement by way of dictum. It noted only that presumed and punitive damages *cannot* be recovered by a private libel plaintiff when the private plaintiff has *not* even shown

actual malice under *New York Times*: "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. That is all the Court had to decide to resolve the damage issue in *Gertz*, for the district court and court of appeals agreed there was no showing of actual malice in *Gertz*, and this Court did not disturb that finding. Whether a private (or public) figure libel plaintiff can recover presumed or punitive damages when actual malice is proven is a question that was not before the Court in *Gertz* and which properly was not decided.

Although many lower courts have found in *Gertz*'s double negative the implication that punitive damages are permitted upon a showing of actual malice, they recognize that the Court has left this question open. See, e.g., *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 478 (9th Cir. 1978); *Buckley v. Littell*, 539 F.2d 822, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Restatement (Second) of Torts* § 621, comment d (1977). This Court itself seems implicitly to have acknowledged that the question remains open, at least with respect to public figure plaintiffs, when in *Smith v. Wade*, — U.S. —, 103 S.Ct. 1625, 1639 n.19 (1983), it declined to "intimate [a] view on any First Amendment issues" raised by such opinions.

Gertz would hardly have been an appropriate case in which to resolve all issues pertaining to punitive and presumed damages in defamation cases. The parties did not brief the issue of punitive or presumed damages, and there was no separate award of punitive damages in the case.

In *Gertz*, the Court rejected the view of the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that even a private figure must show actual malice in challenging a publication on a matter of public interest. A private individual, the Court held, is required by the Constitution only to prove fault by the publisher. That decided the basic issue before the Court, but the Court did not stop there. It recognized that the logic of its decision, while dictating a lower standard of liability for private figures, also required limitations on the types of damages recoverable in libel actions—specifically, presumed damages and punitive damages. The Court opted for a less rigorous standard of liability for private individuals “in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.” 418 U.S. at 348-49. The Court added, however:

But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, *at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349 (emphasis added).

The Court was careful not to state that presumed and punitive damages may be recovered when liability is based on a showing of actual malice; it simply stated that *at least* when, as in *Gertz*, there is no proof of actual malice, there can be no presumed or punitive damages. The Court, in short, cautioned that the rationale for permitting the recovery of actual damages upon a showing of fault did not extend

to the recovery of presumed and punitive damages. But the Court did not purport to define what circumstances, if any, would warrant the imposition of presumed or punitive damages.

While *Gertz* cannot be read to resolve the question whether punitive and presumed damages may be recovered, the reasoning of the Court's opinion suggests strongly that punitive and presumed damages should never be awarded. On the subject of presumed damages, the Court said:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349.

The Court's concern about the impact of punitive damages upon freedom of expression was made equally clear:

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable

amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the State interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

418 U.S. at 350.

The dangers of presumed and punitive damages could not have been stated more clearly. Both inhibit the vigorous exercise of First Amendment freedoms by permitting recovery of massive damage awards unrelated to actual injury. Both invite juries to punish unpopular speakers and the expression of unpopular views. Indeed, punitive damages in defamation cases are expressly designed to punish the exercise of free speech. There is certainly a serious question whether damage awards fraught with these dangers can be squared with the Constitutional guarantees of free speech and free press.

II. PUNITIVE AND PRESUMED DAMAGES FOR DEFAMATION VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Punitive damages are a disfavored anomaly in any context. They are unfaithful to the "fundamental premise of our legal system . . . that damages are awarded to *compensate* the victim." *Smith v. Wade*,

103 S.Ct. at 1641 (Rehnquist, J., dissenting). They can be used to punish unpopular defendants. *Id.*; see *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979). Because they are unpredictable and often enormous, they encourage unnecessary litigation as a means to gratuitous jackpots. And the threat of expensive litigation and arbitrary awards can chill not only undesirable but also "desirable conduct." *Smith v. Wade*, 103 S.Ct. at 1642 (Rehnquist, J., dissenting).

These concerns have special force in the area of free speech. It is a keystone of First Amendment jurisprudence that speech must not be "chilled" because of our "profound national commitment to . . . uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. at 270. Yet the very purpose, and the undeniable effect, of punitive damage awards in defamation cases is to punish and deter speech. Punitive damages and the First Amendment are thus fundamentally at cross-purposes.

It is no answer to this conflict to say that punitive damage awards will deter only unprotected speech: "any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their Constitutional freedom." *Rosenbloom v. Metromedia*, 403 U.S. at 64-65 (Harlan, J., dissenting). Those with lawful messages to convey "steer far wider of the unlawful zone" because the magnitude of the penalty attached to unprotected speech is so uncertain and potentially so great. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); see *Rosenbloom*, 403 U.S. at 82 (Marshall, J., dissenting) ("the size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship"). In awarding

punitive damages, courts necessarily endorse the chilling of First Amendment liberties.

As noted above, this Court in *Gertz* expressly recognized the chilling effect of punitive and presumed damage awards in defamation cases. See pp. 8-9, *supra*. And *Gertz* is only the most recent of a number of opinions in which the Justices of this Court have noted that these awards are constitutionally suspect. In *New York Times Co. v. Sullivan*, the Court commented that "the pall of fear and timidity imposed [by large damage awards] . . . is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. Justice Black wrote in concurrence that "huge verdicts . . . threaten the very existence" of a virile press. *Id.* at 294. In *Rosenbloom*, Justice Harlan abandoned his earlier conclusion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion), that the First Amendment does not in any way limit punitive damages. With the cautionary remark that "matters are in flux," 403 U.S. at 72 n.3, Justice Harlan wrote that he now thought the Constitution imposed "*at a minimum*" two limits on punitive damage awards: there must be proof that "the speaker acted out of express malice," and punitive awards must "bear a reasonable and purposeful relationship to the actual harm done." *Id.* at 73, 77 (dissenting opinion; majority did not address question of punitive damages) (emphasis added). Justice Marshall and Justice Stewart concluded in *Rosenbloom* that any award of punitive or presumed damages in a defamation case is unconstitutional, because "the fear of the extensive awards that may be given . . . must necessarily produce the impingement on freedom of the press rec-

ognized in *New York Times*." *Id.* at 83 (dissenting opinion).

Justices Marshall and Stewart later joined the Court's opinion in *Gertz*. Indeed, the votes of these two Justices, who had previously rejected punitive and presumed damages altogether, were essential to the majority in *Gertz*. The opinion they joined does not contradict their earlier views. The Court's statements in *Gertz* are no more than tentatively worded dicta which "leave open the possibility that punitive damages may in time be found too intimidating to free expression to be allowed at all." *Lewis, New York Times v. Sullivan Reconsidered: Time To Return to "The Central Meaning Of The First Amendment"*, 83 Colum. L. Rev. 603, 617 (1983).

Justice Harlan, noting that the law with respect to punitive damages is "in flux," emphasized twice in *Rosenbloom* the importance of "further judicial experience in this area" before any authoritative rule could be stated. 403 U.S. at 74, 77. By now the lessons of experience are clear: in the past few years, the fear that punitive damage awards could be used to censor the press has become a reality. When *Gertz* was decided in 1974, massive damage awards against the press were virtually unheard of. Today, they have become commonplace.

- In April 1979 a jury returned a verdict of \$4.5 million, including \$1.5 million in punitive damages, against the *San Francisco Examiner* and its reporters. The plaintiffs, two policemen and a prosecutor, had complained of a series of articles describing their role in securing the conviction of a youth on a murder charge. *McCoy v. The Hearst Corp.*, Civ. No. 49915 (Cal. Ct. App., 1st App. Dist., Div. 4). An appeal is pending.

● In May 1980 a jury awarded a county sheriff \$200,000 in compensatory damages and \$500,000 in punitive damages against a small local newspaper, the *Ann Arbor News*, based on articles which accused the sheriff of improprieties including death threats against one of his deputies, brutality against private citizens, and the misappropriation of public funds. The verdict was reversed on appeal on the ground that the evidence could not support a finding of actual malice. *Postill v. Booth Newspapers*, 325 N.W.2d 511 (Mich. App. 1982).

● In June 1980 *The Alton* (Illinois) *Telegraph*, a respected publication with a circulation of 38,000 and net worth of about \$3 million, was ordered to pay \$9.2 million, including \$2.5 million in punitive damages, to a local builder because two of its reporters had written a memorandum to a U.S. Justice Department investigator passing on a tip that the builder was receiving money from the Mafia in the form of bank loans. *Green v. Alton Telegraph Printing Co.*, 107 Ill. App. 755, 438 N.E.2d 203 (1982).

● In February 1981 a federal court jury in Wyoming awarded the astounding sum of \$26.5 million—\$1.5 million in compensatory damages and \$25 million in punitive damages—to a former beauty pageant winner who complained she was defamed by a fictional article in *Penthouse* magazine. This judgment was reduced by the trial court to \$14 million, and reversed by the Court of Appeals on the ground that *Penthouse's* fictional article could not reasonably be understood as describing any actual facts about the plaintiff. *Pring v. Penthouse, International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 3112 (1983).

● In March 1981 a California jury awarded \$300,000 in compensatory damages and \$1.3 million in punitives to Carol Burnett, who complained that the *National Enquirer* falsely reported she had engaged in loud and boisterous behavior in a Washington, D.C. restaurant. *Burnett v. National Enquirer, Inc.*, 7 Media L. Rep. [BNA] 1321 (Cal. Super. 1981). The verdict was remitted by the trial court to \$800,000 and reduced on appeal to \$200,000. *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 193 Cal. Rptr. 205 (1983). A further appeal is pending.

● A Texas jury returned a verdict of \$1 million in compensatory damages and \$1 million in punitive damages against the publisher of the *Dallas Morning News* in a case brought by a benefactor of a state university who was involved in a controversy over the firing of several faculty members and the resignation of the president. The plaintiff had alleged that his comments on the controversy were falsely characterized as threats against university officials. The judgment was reversed by a court of appeals on the ground that the allegedly defamatory statements were either true or protected statements of opinion, and on the further ground that there was no evidence of actual malice. *A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. 1982).

● In July 1982 a *Washington Post* story that Mobil President William Tavoulareas had "set up" his son in a ship management firm resulted in a \$2 million jury verdict, including \$1.8 million in punitive damages, against the Post. Judgment notwithstanding the verdict was subsequently entered in the Post's favor on the ground that there was no evidence of actual malice.

Tavoulareas v. The Washington Post Company, 567 F. Supp. 651 (D.D.C. 1983). Plaintiff's appeal is pending.

- A verdict of zero compensatory damages and \$2.5 million punitive damages was entered against an author and publisher whose book mistakenly asserted that the plaintiff had been indicted three times for the unauthorized practice of optometry. The author had confused plaintiff with his brother. *Rogers v. Doubleday*, 644 S.W. 2d 833 (Tex. App. 1982). The case is on appeal before the Texas Supreme Court.

- In May 1983 a judge entered a verdict of \$2 million in compensatory damages and \$5 million in punitive damages in favor of an Atlantic City hotel owner who claimed that an article in *Philadelphia Magazine* falsely characterized him as a drug dealer. *Edghill v. Municipal Publications, Inc.*, No. 2371 (Pa. Ct. Common Pleas, May Term 1972). Defendant's motion to recuse the trial judge is pending on appeal.

- In June 1983 a jury awarded \$4.5 million, including \$3 million in punitive damages, to a former Philadelphia district attorney, Richard Sprague, for an article in the *Philadelphia Inquirer* raising questions about the propriety of Sprague's participation in a homicide case involving the son of his close friend, a former state police commissioner. *Sprague v. Walter*, No. 3644 (Pa. Ct. Common Pleas, April Term 1973). The *Inquirer's* motion for a new trial is pending.

- In September 1983 a Texas jury awarded \$600,000 in compensatory damages and \$1 million in punitive damages against a television station which reported that a company in the business of armorplating civilian vehicles for

sale principally in Central America was under investigation by the Bureau of Alcohol, Tobacco, and Firearms for smuggling guns. *International Security Group, Inc. v. The Outlet Co.*, No. 79-CI-10293 (Dist. Ct., 224th Jud. Dist., Bexar Co.).

- Recently, a federal court jury in Colorado awarded \$3.8 million in presumed damages to a company whose sales and employees were understated in a financial report prepared by the petitioner in this case, Dun & Bradstreet. *Sunward Corp. v. Dun & Bradstreet, Inc.*, Civil Action No. 82-K-147 (D. Colo.).

To be sure, many of these awards are reduced or set aside entirely by the trial court or the court of appeals. But that does not mitigate their chilling effect. Indeed, the high rate with which these huge awards are set aside bears out the view that juries award punitive damages to punish unpopular views or publications, with indifference to the values of free speech and free press, and disregard for even the minimum requirements of the law.

One case dramatically illustrates that the prospect of securing a reversal or reduction in a punitive damage award is small comfort to a small newspaper faced with a huge jury verdict. The \$9.2 million judgment against *The Alton Telegraph* forced the newspaper into bankruptcy and compelled it to settle the case before the appeal it had prepared could be heard. That appeal may well have been meritorious: it raised the issues whether the complaint, filed seven years after the allegedly defamatory memorandum was sent, was barred by the statute of limitations; whether the memorandum was the legal cause of the plaintiff's alleged damages; and whether the memorandum, which had been sent to the Justice Depart-

ment, was protected by the qualified common law privilege to report allegations of wrongdoing to law enforcement officials. Although these arguments may well have prevailed on appeal, the *Telegraph* simply could not afford to pursue them, and chose instead to settle the case for \$1.4 million in order to save itself from extinction. "How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," *The Wall Street Journal*, September 29, 1983, at 1.

Today, *The Alton Telegraph* still feels the chilling effect of its libel judgment. Its editor, publisher and partial owner, Steven A. Cousley, told a *Wall Street Journal* reporter:

We are like a tight end who hears footsteps everytime he runs to catch a pass. . . . Wouldn't you be gun-shy if you nearly lost your livelihood and your home?

Id. According to *The Wall Street Journal* story, the *Alton Telegraph*

appears to be shying away from important stories. When someone called recently with a tip about misconduct in a sheriff's office, Steven Cousley decided against investigating. 'Let someone else stick their neck out this time,' a reporter heard him tell an editor. (Asked about the remark, Mr. Cousley says, 'I probably said that.')

Id. at 22.

The huge damage awards that juries have returned in recent defamation cases have unquestionably discouraged the "uninhibited, robust, and wide-open" inquiry and debate that *New York Times Co. v. Sullivan* was intended to foster. 376 U.S. at 270. These awards can threaten the very existence of some publications, and they dampen the enthusiasm and vigor of all.

Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

Id. at 278.

Particularly in the light of experience in recent years, the question must be posed: what legitimate state interest can justify punitive and presumed damages awards that have the undeniable effect, and in the case of punitives the express purpose, of chilling freedom of speech and of the press? On this point the language of *Gertz* is unequivocal. The states have "no substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The only "legitimate State interest" in authorizing juries to award damages for defamation is "the compensation of individuals." *Id.* at 341. See also *id.* at 348-49; *Rosenbloom*, 403 U.S. at 66 (Harlan, J. dissenting) ("the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm"); *Curtis Publishing Co. v. Butts*, 388 U.S. at 153. And punitive damages are "wholly irrelevant" to that state interest. *Gertz*, 418 U.S. at 350.

Because of the impact on protected speech of any remedy for unprotected speech, state remedies "must reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349; see *Keyishian v. Board of Regents*, 385 U.S. 589, 602-04 (1967). It is plain, indeed tautological, that permitting recovery of proven actual damages adequately protects the state's legitimate interest in compensation. Punitive and presumed damages are unneces-

sary to protect that interest and are therefore unconstitutional.

Even if the deterrence of unprotected speech were a "legitimate function of libel law," *Rosenbloom*, 403 U.S. at 66 (Harlan, J., dissenting)—and no opinion of this Court suggests that it is—unprotected defamatory speech is effectively and sufficiently deterred by "the very possibility of having to engage in litigation, an expensive and protracted process," *Rosenbloom*, 403 U.S. at 52, and by the threat of compensatory damage awards. Thus in *Sprouse v. Clay Communications, Inc.*, 211 S.E. 2d 674, 692 (W. Va.), *cert. denied*, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals rejected punitive damages on the ground that actual damages were "adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future." *See also Maheu v. Hughes Tool Co.*, 384 F.Supp. 166, 170-71 (C.D.Cal. 1974), *rev'd in part and aff'd in part*, 569 F.2d 459 (9th Cir. 1978). Assuming, *arguendo*, that there could be a legitimate state interest in providing an additional measure of punishment or deterrence in some cases, the present system of punitive damage awards is intolerable because punitive damages, "limited only by the gentle rule that they not be excessive," *Gertz*, 418 U.S. at 350, are not narrowly tailored to promoting that interest. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. at 602-04. Punitive damages are unpredictable in amount and often disproportionate to any harm actually done or reasonably foreseen. The largely uncontrolled discretion of juries to award punitive damages itself renders them unsuitable instruments to control unprotected speech, because the terror they inspire chills protected speech as well.

In the final analysis, damage awards whose very purpose is to punish speech have no place in a system that values and protects freedom of speech—and punitive and presumed damage awards which threaten the vigor and, in some cases, the very existence of the press, cannot be reconciled with a system that values and protects freedom of the press. Punitive and presumed damages, in short, cannot be squared with the First Amendment.²

III. THE JUDGMENT IN THIS CASE SHOULD BE REVERSED ON THE GROUND THAT DUN & BRADSTREET IS ENTITLED TO THE MINIMUM PROTECTION IT HAS ASKED FOR

There are, *amicus* submits, a number of open questions concerning the availability of punitive and pre-

² Three states have held that the First and Fourteenth Amendments bar punitive damages for libel plaintiffs who recover adequate compensatory damages. *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d at 692; *McHale v. Lake Charles American Press*, 390 So.2d 556 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 859-60, 330 N.E.2d 161, 169 (1975). The Supreme Judicial Court of Massachusetts rested its holding on both state and federal constitutional grounds:

We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based on negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship.

367 Mass. at 859-60, 330 N.E.2d at 169.

At least two states have held that punitive damages in libel cases are barred by the free speech and free press guarantees of their own constitutions. *Hall v. May Department Stores*, 292 Or. 131, 637 P.2d 126 (1981); *Tasket v. KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976).

sumed damages in libel cases, but they need not and should not all be resolved in this case. As the foregoing discussion demonstrates, there is a serious question whether punitive and presumed damages should ever be allowed in a defamation case. If they were to be approved under any circumstances, there would certainly arise the troubling question whether they should ever be permitted against speech that touches upon public affairs or matters of public interest.³

³ This Court has often said that speech concerning public affairs and public issues is at the core of the First Amendment's protection. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *New York Times Co. v. Sullivan*, 376 U.S. at 270 ("debate on public issues should be uninhibited, robust, and wide-open"). And the Court has emphasized that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). In *Rosenbloom v. Metromedia*, a plurality of this Court concluded that publications on matters of public interest and concern should receive the benefit of the *New York Times* standard for recovery of compensatory damages. The Court rejected that view in *Gertz*, because it abridged to an unacceptable degree the state's interest in providing "a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U.S. at 346. But that interest in compensating individuals who are defamed cannot justify an award of punitive damages. Nor can any state interest justify a damage award intended to punish speech on a matter of public interest and concern.

In *Gertz* the Court expressed concern about calling upon judges to determine "which publications address issues of

There may be a question, as the Petition for Certiorari puts it, whether there is a basis for distinguishing between the press and the rest of the public when it comes to punitive damages.⁴ There may also be a question whether, if punitive damages were to be allowed, proof in addition to knowledge of falsity or

'general or public interest' and which do not." 418 U.S. at 346. The line may be difficult (and in some contexts dangerous) to draw, and that difficulty may be an additional reason to prohibit punitive damages altogether.

⁴ As this Court recently emphasized, the explicit guarantee of freedom of the press was important to the Framers. *Minneapolis Star v. Minnesota Commissioner of Revenue*, — U.S. —, 103 S. Ct. 1365, 1371 (1983). In that case and many others, the Court has emphasized the special role that the press plays in informing the public and guaranteeing that government is responsive to the public's will. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Mills v. Alabama*, 384 U.S. at 219; *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). That is not to say that members of the public, who enjoy the protection of the free speech provision of the First Amendment, should not enjoy full protection against punitive and presumed damage awards for defamation. Certainly there could be no basis for distinguishing between the established press and the lonely pamphleteer in defining the media for purposes of defamation law. Moreover, any line between media and nonmedia defendants in defamation cases would be a troubling and potentially mischievous one, which could effectively limit the diversity of viewpoints and information available to the public. *Dun & Bradstreet* apparently does not argue for media status, but as its own information business illustrates, information that is of insufficient general interest to warrant publication in the mass media may still be of vital importance to a small segment of the public.

reckless disregard for the truth should be required—namely, ill will, spite or hatred.⁵

The Court need not resolve these issues in this case. Dun & Bradstreet, a company that published certain financial and credit information about another company, seeks the protection of the actual malice standard to the extent that punitive and presumed damages are at issue. Surely it is entitled to no less protection than that, and the Court should so hold. Punitive

⁵ In *Smith v. Wade*, the Court expressly declined to intimate any view on the First Amendment issues raised by decisions permitting punitive damage awards in favor of a public official or public figure upon the showing of actual malice required for the recovery of compensatory damages. 103 S. Ct. at 1639 n.19. In his *Rosenbloom* dissent, Justice Harlan expressed the view that punitive damages should not be permitted unless "the plaintiff has proved that the speaker acted out of *express malice*." 403 U.S. at 77 (emphasis added). Such proof—that the speaker was motivated by ill will or personal animus—is quite different from proof of "actual malice" under *New York Times*. See, e.g., *Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Henry v. Collins*, 380 U.S. 356 (1965). Requiring such proof of bad motive would comport with "the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252 (1974), and might provide some additional protection against unwarranted punitive damage awards. Two states have held that punitive damages are barred by their constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976); *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975).

damages for defamatory falsehoods should never be permitted upon facts of the sort deemed sufficient by the Vermont Supreme Court in this case—that Dun & Bradstreet's employee "inadvertently" mistook the bankruptcy of a former Greenmoss employee for the bankruptcy of Greenmoss itself, and that Dun & Bradstreet failed to adhere to its routine practice of prepublication verification. J. App. 35. That may be evidence of negligence, but not evidence that warrants the imposition of punitive damages under any standard compatible with the First Amendment. The Court should hold that Dun & Bradstreet is *at least* entitled to the minimum protection against punitive and presumed damages it has asked for—namely, the actual malice standard of *New York Times*—and it should leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

IV. CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Vermont should be reversed.

Respectfully submitted,

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Counsel for petitioner: Garrett Jr., Gordon Lee

Counsel for respondent: Heilmann, Thomas F.

Entry	Date	Note	Proceedings and Orders
1	Jul 8 1983	G	Petition for writ of certiorari filed.
2	Aug 10 1983		DISTRIIBUTED. September 26, 1983
3	Aug 11 1983	X	Brief of respondent Greenmoss Builders, Inc. in opposition filed.
4	Aug 15 1983		Respondent's letter noting compliance with Rule 28.1 filed.
6	Oct 3 1983		REDISTRIBUED. October 7, 1983
8	Oct 11 1983		REDISTRIBUED. October 14, 1983
11	Oct 19 1983		REDISTRIBUED. October 28, 1983.
13	Oct 31 1983		REDISTRIBUED. November 4, 1983
14	Nov 7 1983		Petition GRANTED. *****
15	Dec 22 1983		Brief of petitioner Dun & Bradstreet, Inc. filed.
16	Dec 22 1983		Joint appendix filed.
17	Dec 22 1983		Brief amicus curiae of The Washinton Post filed.
18	Jan 5 1984		Record filed.
19	Jan 5 1984		Certified original records, 1 box, received.
21	Jan 11 1984		Order extending time to file brief of respondent on the merits until January 30, 1984.
23	Jan 23 1984		Brief amicus curiae of Sunward Corporation filed.
24	Jan 30 1984		Brief of respondent Greenmoss Builders, Inc. filed.
25	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 21, 1984. (4th case)
26	Feb 15 1984		CIRCULATED.
27	Mar 6 1984	D	Motion of respondent for leave to file supplemental brief filed.
28	Mar 7 1984	X	Reply brief of petitioner Dun & Bradstreet, Inc. filed.
29	Mar 9 1984		DISTRIBUED. March 16, 1984. (Motion of respond. for leave to file supplemental brief).
30	Mar 19 1984		Motion of respondent for leave to file supplemental brief DENIED.
31	Mar 21 1984		ARGUED.